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IN THE

Supreme Court Of The United States

October Term, 1972

NO. 72-1258

GEORGE S. HEITZLER, JR.,
Petitioner,

v.

CINCINNATI BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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TABLE OF CONTENTS

	Page
Table of Authorities	v
Opinion Below	1
Jurisdiction	2
Questions Presented	2-5
Statutory Provisions Relied Upon	5-8
Statement of the Case	9

I.

Because the Hearing Panel gave Petitioner the right to file a Brief on the merits of the grievance charges filed against him, but then decided the case on the merits without ever giving Petitioner the opportunity to file his Brief, and because the Hearing Panel violated their own ruling as to Briefs on the merits, Petitioner has been denied procedural due process, has been denied the effective assistance of counsel, and has been deprived of his right to counsel 22-27

II.

Because Gordon Scherer was a member of the Board of Commissioners and sat in on the very deliberations and voting of the Board of Commissioners, and because Scherer was a chief witness for the Bar Association, had testified as to alleged illegal activities of Petitioner before the Hamilton County Grand Jury, and was highly critical of the Prosecuting Attorney's handling of the Grand Jury proceedings, then the deliberations of the Board were subject to grave questions concerning their impartiality and their deliberations, findings and recommendations as affirmed by the Supreme Court of Ohio, violated due process of law 28-30

Page

III.

Because Petitioner was not given an opportunity to file exceptions to, or to attack the findings of fact and recommendations of the Hearing Panel before the Board filed its findings with the Supreme Court of Ohio, or in the alternative, because the Board of Commissioners failed to make an independent determination of the record, exhibits and transcript, then Petitioner was denied due process of law, notice and an opportunity to be heard, and was denied the right to counsel 30-34

IV.

Because the disciplinary proceedings conducted against Petitioner were conducted pursuant to Gov. R. V of the Supreme Court Rules for the Government of the Bar of Ohio dealing with disciplinary procedure for attorneys rather than pursuant to Gov. R. VI dealing with the removal of Judges in a case where Petitioner is charged with violations of the Canons of Judicial Ethics, the entire disciplinary proceedings are void *ab initio* because of a lack of jurisdiction 35-43

V.

Because three members of the Board of Commissioners in the instant case had sat as the Hearing Panel in a companion case involving different disciplinary charges but growing out of testimony already given in the instant case, then the Board must be considered tainted, and the entire proceedings were conducted in violation of Petitioner's Fifth and Fourteenth Amendment due process rights 43-45

Page

VI.

The holding of the Supreme Court of Ohio that Petitioner left the appearance of unlawful cohabitation with Carol Chasteen, now Petitioner's wife, in violation of Canon 4 of the Canons of Judicial Ethics, is unsubstantiated and is violative of due process 45-53

VII.

Because Petitioner did not know of the unauthorized use of his name in connection with Harmony Loan Company of Kentucky, in which he sat as a member of the Board of Directors, and because the Ohio Judicial Standards permit a Judge to sit on Boards of Directors, and because Petitioner did not allow the power of his office or the influence of his name to be used to assist the business of another, and because the Supreme Court of Ohio based their opinion upon conduct which cannot be constitutionally prescribed, the holding that Petitioner violated Canons 13, 25, 33 and 34 is unfounded, violates due process and freedom of Association 53-60

VIII.

Although Judge Heitzler, while a Judge in a Municipal Court in Ohio, signed numerous orders, only in uncontested cases, this will not support a finding and judgment against Petitioner for alleged violations of Canons 4, 13, 25, 26, 29 and 34, and such findings contravene due process 60-63

IX.

Because Petitioner hired a man who had a previous criminal record, but whose last felony conviction was in 1955 in a nonsensitive position,

Page

as an usher, then a finding that such conduct constituted a violation of Judicial Canon 12, is violative of due process 63-67

X.

Even assuming *arguendo* Petitioner has been guilty of some misconduct in office, the indefinite suspension levied upon him is far too severe a penalty, and as such, contravenes due process 67-68

Conclusion 69

Appendix (Separate Volume)

TABLE OF AUTHORITIES

Cases:	Page
Chambers v. Central Committee, 203 Okla. 583, 224 P. 2d 583 (1950)	42
Ex Parte Wall, 107 U. S. 265 (1883)	27, 32
In Re Echles, 430 F. 2d 347 (7th Circuit 1970)	27
In Re Gibbs, 214 N. W. 850 (S. D. 1927)	42
In Re Jones, 202 La. 729, 12 So. 2d 795 (1943)	41, 42
In Re Ming, 469 F. 2d 1352 (7th Circuit, August 2, 1972)	27, 32
In Re Nevius, 174 Ohio St. 560 (1963)	38
In Re Ruffalo, 390 U. S. 544 (1968) reh. den. 390 U. S. 961	27, 30, 32
In Re Stolar, 401 U. S. 23 (1971)	55
In Re Strahl, 201 App. Div. 729, 195 N.Y.S. 385 (1922)	42
In Re Watson, 71 Nev. 227, 286 P. 2d 254 (1955)	41
Kearns, 28 Ohio St. 2d 121 (1971)	64
Mahoning County Bar Association v. Franko, 168 Ohio St. 17 (1958)	35
Mahoning County Bar Association v. Ruffalo, 176 Ohio St. 263 (1964)	33
McMillen v. Diehl, 123 Ohio St. 212, 190 N. E. 567 (1934)	40, 56, 61
Spevack v. Klein, 385 U. S. 511 (1967)	30, 32, 55
State Bar v. Superior Court, 278 P. 432 (Cal. 1929)	42
State Ex Rel. Stokes v. Probate Court 22 Ohio St. 2d 120, 258 N. E. 2d 607 (1970)	39, 41, 61, 62

Page

State Ex Rel. Vogt v. Donahey, 108 Ohio St. 440, 140 N. E. 609 ..... 40, 61

Weston v. Board of Governors of State Bar, 177 Okla. 467, 61 P. 2d 229 (1936) 41

Wilbur v. Howard, 70 F. Supp. 930 (D.C.E.D. Ky. 1947) rev'd Howard v. Wilbur, 166 F. 2d 884 (6th Circuit 1948) 27

Articles:

American Bar Association Report, *Offender Employment Review*, March 1972 63

American Bar Association's Commission on Correctional Facilities and Service, *Coordination Bulletin No. 5*, February 1972 ..... 63, 64

A.B.A. Opinion:

Opinion 322, rendered by the American Bar Association, and reported in 55 A.B.A. Journal 666-668 (1969) entitled "*Conduct of Judges*" 56

Texts:

31 Ohio Jur. 2d 448, *Ministerial or Formal Acts* 62

Codes:

O.R.C. §2701.11 ..... 35-38, 43, 62
O.R.C. §2701.12 ..... 35-38, 43, 62

Canons of Judicial Ethics:

Canon 4 ..... 45, 60
Canon 12 ..... 63, 65, 66
Canon 13 ..... 53, 56, 59, 60
Canon 25 ..... 53, 59, 60
Canon 26 60
Canon 29 60
Canon 33 ..... 53, 59
Canon 34 ..... 53, 58, 59, 60

Page

Constitution and Amendments:

Article II, Section 38, Ohio Constitution 36

U. S. Constitution
Amendment 1 58
Amendment 5 ..... 27, 43, 45
Amendment 6 27
Amendment 14 ..... 27, 43, 45, 58

Rules of Court:

Gov. R. V - Supreme Court Rules for the Government of the Bar of Ohio 35-38, 42, 62

Gov. R. VI - Supreme Court Rules for the Government of the Bar of Ohio 35-39, 43, 62

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CINCINNATI BAR ASSOCIATION,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, George S. Heitzler, Jr., respectfully prays that a Writ of Certiorari issue to review the *Per Curiam* Opinion and Order of the Supreme Court of Ohio, entered on the 15th day of December, 1972.

OPINION BELOW

The *Per Curiam* Opinion and the final Order of the Supreme Court of Ohio, reported in 32 Ohio St. 2d 214, are set out in full in the Appendix at pp. A-119 to A-145.

JURISDICTION

The Opinion and Order of the Supreme Court of Ohio were entered on December 15, 1972. A prompt Motion to Stay Execution Pending Appeal to this Honorable Court was filed in the Supreme Court of Ohio on December 22, 1972, and by Order entered on January 12, 1973, this Motion was denied. Appendix pp. A-145 to A-148. This Petition is filed within ninety (90) days of the date of entry of the final Order and Opinion. The jurisdiction of this Court is based upon 28 U.S.C. §1257(3), and Supreme Court Rules 19-27, among others.

QUESTIONS PRESENTED

I. Because the Hearing Panel gave Petitioner the right to file a Brief on the merits of the grievance charges filed against him, but then decided the case on the merits without ever giving Petitioner the opportunity to file his Brief, and because the Hearing Panel violated their own ruling as to Briefs on the merits, Petitioner has been denied procedural due process, has been denied the effective assistance of counsel, and has been deprived of his right to counsel.

II. Because Gordon Scherer was a member of the Board of Commissioners and sat in on the very deliberations and voting of the Board of Commissioners, and because Scherer was a chief witness for the Bar Association, had testified as to alleged illegal activities of Petitioner before the Hamilton County Grand Jury, and was highly critical of the Prosecuting Attorney's

handling of the Grand Jury proceedings, then the deliberations of the Board were subject to grave questions concerning their impartiality and their deliberations, findings and recommendations as affirmed by the Supreme Court of Ohio, violated due process of law.

III. Because Petitioner was not given an opportunity to file exceptions to, or to attack the findings of fact and recommendations of the Hearing Panel before the Board filed its findings with the Supreme Court of Ohio, or in the alternative, because the Board of Commissioners failed to make an independent determination of the record, exhibits and transcript, then Petitioner was denied due process of law, notice and an opportunity to be heard, and was denied the right to counsel.

IV. Because the disciplinary proceedings conducted against Petitioner who was a Judge and not a practicing attorney were conducted pursuant to Gov. R. V of the Supreme Court Rules for the Government of the Bar of Ohio dealing with disciplinary procedure for attorneys rather than pursuant to Gov. R. VI dealing with the removal of Judges in a case where Petitioner is charged with violations of the Canons of Judicial Ethics, the entire disciplinary proceedings are void *ab initio* because of a lack of jurisdiction.

V. Because three members of the Board of Commissioners in the instant case had sat as the Hearing Panel in a companion case involving different disciplinary charges but growing out

of testimony already given in the instant case, then the Board must be considered tainted, and the entire proceedings were conducted in violation of Petitioner's Fifth and Fourteenth Amendment due process rights.

VI. The holding of the Supreme Court of Ohio that Petitioner left the appearance of unlawful cohabitation with Carol Chasteen, now Petitioner's wife, in violation of Canon 4 of the Canons of Judicial Ethics, is unsubstantiated and is violative of due process.

VII. Because Petitioner did not know of the unauthorized use of his name in connection with Harmony Loan Company of Kentucky, in which he sat as a member of the Board of Directors, and because the Ohio judicial standards permit a Judge to sit on Boards of Directors, and because Petitioner did not allow the power of his office or the influence of his name to be used to assist the business of another, and because the Supreme Court of Ohio based their opinion upon conduct which cannot be constitutionally prescribed, the holding that Petitioner violated Canons 13, 25, 33 and 34 is unfounded, violates due process and freedom of association.

VIII. Although Judge Heitzler, while a Judge in a Municipal Court in Ohio, signed numerous orders, only in uncontested cases, this will not support a finding and judgment against Petitioner for alleged violations of Canons 4, 13, 25, 26, 29 and 34, and such findings contravene due process.

IX. Because Petitioner hired a man who had a previous criminal record, but whose last felony conviction was in 1955 in a nonsensitive position, as an usher, then a finding that such conduct constituted a violation of Judicial Canon 12, is violative of due process.

X. Even assuming *arguendo* Petitioner has been guilty of some misconduct in office, the indefinite suspension levied upon him is far too severe a penalty, and as such, contravenes due process.

STATUTORY PROVISIONS RELIED UPON

AMENDMENT I TO THE UNITED STATES CONSTITUTION. [Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V TO THE UNITED STATES CONSTITUTION. [Appears in the Appendix p. A-66.]

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION. [Appears in the Appendix pp. A-66-67.]

OHIO REVISED CODE, SECTION 2701.11. [Appears in the Appendix pp. A-68-69.]

OHIO REVISED CODE, SECTION 2701.12. [Appears in the Appendix pp. A-69-70.]

GOV. RULE VI OF THE SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO.

"Pursuant to legislative authority provided by R. C. 2701.11 and 2701.12, the following rule is adopted, effective February 11, 1966.

1. (a) The written and sworn complaint required by R. C. 2701.11 shall be filed with the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court heretofore established under Rule V of the Supreme Court Rules for the Government of the Bar of Ohio, who shall transmit such complaint to the Chairman of the Board. Six copies of the complaint shall be so filed. The complaint shall set forth specifically the grounds claimed to be cause for retirement, removal, or suspension of the Judge from office and time when and place where any act, acts, omission or omissions occurred which are alleged to be cause for such retirement, removal or suspension under R. C. 2701.12. * * *

(b) * * *

(c) * * *

2. Upon receipt of such written and sworn complaint by the Chairman of the Board of Commissioners on Grievances and Discipline of the Supreme Court, he shall, as soon as practicable, convene such Board and present to it the complaint. The Secretary of the Board of Commissioners shall send a copy of such complaint to the Judge against whom the complaint is made. The

Board shall then proceed to investigate the complaint. After completion of this investigation, if two-thirds of the members of such Board affirmatively determine that there is substantial credible evidence in support of the complaint, the Secretary of the Board of Commissioners shall certify to the Supreme Court the result of such investigation. The investigation conducted by the Board of Commissioners shall be private. * * *

3. The report of the Board of Commissioners on Grievances and Discipline shall be sent by certified mail to the Judge against whom the complaint is made at the same time such report is sent to the Supreme Court.

4. The Supreme Court shall, if the report finds there is substantial credible evidence in support of such complaint, appoint within a reasonable time after its receipt a Commission of five Judges, as provided in R. C. 2701.11.

5. The Chairman of the Commission of Judges appointed to determine the question of retirement, removal or suspension of a judge shall be designated by the Supreme Court. Such Chairman shall promptly after receipt of the notice of his appointment and the receipt of the complaint fix a day for the hearing. * * *

6. If the Commission of Judges determines by majority vote that grounds for retirement, removal or suspension without pay have been established by clear and convincing evidence as alleged in the complaint or as provided in R. C. 2701.12 the Commission of Judges shall make such order as in its judgment is necessary and proper. * * *

(7. through 13. omitted.)

GOV. RULE V OF THE SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO.

"Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on March 11, 1964, and shall apply to all pending cases.

(1) * * *

(2) *Jurisdiction of Board.* The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, preserve the record, make findings and submit recommendations to this Court as hereinafter provided:

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension for an indefinite period from the practice of law, or judge, or

(b) concerning the mental illness of any attorney and counselor at law or judge, or

(c) relating to petitions for reinstatement as an attorney and counselor at law in this State, or

(d) upon reference by this Court of conduct affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court * * *"

STATEMENT OF THE CASE

On August 11, 1971, three members of the Cincinnati Bar Association filed a Complaint before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. Appendix pp. A-1 to A-7. Named as Respondent was George S. Heitzler, Jr., the duly qualified and elected Judge of the Court of Common Pleas, Division of Domestic Relations, of Hamilton County, Ohio.

The Complaint charged *inter alia* that Petitioner had allegedly violated certain Canons of Judicial Ethics:

(1) because of his conduct in the personal and private affairs of his life; and

(2) because of certain personal financial investments made in Harmony Loan Company—a Kentucky small loan company; and

(3) because of Petitioner's association with some of the officers and directors of Harmony Loan and also by allegedly permitting his name to be used publicly in connection with Harmony Loan Company; and

(4) because Petitioner signed certain Orders only in uncontested cases involving Harmony Loan of Kentucky while sitting as Judge of the Municipal Court during a prior term of office; and finally

(5) because Petitioner hired a man whose last felony conviction was in 1955 to act as a "glorified usher" for persons attending various court rooms in the Domestic Relations Court.

The Bar Association alleged that Judge Heitzler violated Canons 1, 3, 4, 12, 13, 25, 26, 33 and 34.[1]

Judge Heitzler timely filed an Answer denying the above charges. Appendix pp. A-7 to A-11.

Next, on October 4, 1971, two additional charges were leveled against Judge Heitzler in a Supplemental Complaint filed by the same three members of the Cincinnati Bar Association. Appendix pp. A-11 to A-13. The charges were later dismissed.

The Complaint and Answer and Supplemental Complaint and Supplemental Answer came on for a hearing commencing December 16, 1971, before a three-man Hearing Panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.[2] Testimony was taken for six days and on January 7, 1972, the hearings were concluded.

At the close of the hearings, Judge Heitzler moved to dismiss the Supplemental Complaint, but the Hearing Panel reserved a ruling on this Motion and instead set forth a *well-defined* schedule for filing *all Briefs* in the case both as to the merits of the Complaint *and* as to the Supplemental Complaint. Both the Bar Association and Judge Heitzler submitted Briefs concerning the Motion to Dismiss the Supplemental Complaint.

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[1]At the close of the hearings before the Panel, the Bar Association added Canon 29 to the other Canons of Judicial Ethics which Petitioner allegedly violated.

[2]Hereinafter referred to as the Hearing Panel. The transcript of these hearings has been requested by Petitioner to be certified and transmitted to this Honorable Court as part of the record in this case. Therefore, all transcript references hereinafter designated as "T-.....", refer to the transcript of testimony taken before the Hearing Panel.

However, the Hearing Panel had provided that Petitioner was to have two weeks following notice of the ruling by the Panel on the Motion to Dismiss the Supplemental Complaint within which to file his Brief on the merits of those charges filed against him initially in the Complaint. The Bar Association was then to have two weeks after receipt of Petitioner's Brief to file an Answer Brief. T-1399-1408 inclusive.

Notwithstanding the above-stated and well-defined time schedule set out by the Panel on or about August 9, 1972, R. O. Klausmeyer, one of counsel for the Bar Association, prematurely filed the Bar Association's Brief on the merits of the charges in the Complaint and admitted this early filing in a cover letter written to the Panel. And on August 4, 1972, without notice of any kind to Petitioner, and without ever permitting Petitioner to file his Brief on the merits of the charges embodied in the Complaint, the Hearing Panel filed their Findings of Fact and Recommendation of Hearing Panel[3] with the Secretary of the Board of Commissioners on Grievances and Discipline, and *simultaneously* sustained Petitioner's Motion to Dismiss the Supplemental Complaint. The Panel thus quite erroneously stated that:

> "Both parties were also granted the opportunity to submit briefs * * * (2) on the merits of the Complaints, and (3) on the appropriate remedy should violations be found."

Petitioner was therefore denied the right to file a Brief on the merits—an uncontroverted fact.

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[3]Hereinafter referred to as Panel Findings.

The Hearing Panel ultimately dismissed some of the charges embodied in the Complaint, and dismissed the Supplemental Complaint entirely. Appendix pp. A-16 to A-37. However, the Hearing Panel did find that Petitioner had allegedly been guilty of misconduct:

(1) because Petitioner left the appearance of public co-habitation with his second and present wife at a time when he was still married to his first wife [although subject to a separate maintenance decree]. Thus, Petitioner, in his personal behavior in his everyday life, while a Judge, gave the appearance of impropriety, in violation of Canon 4 of the Canons of Judicial Ethics. The remainder of the charges revolving around Petitioner's private social life were dismissed. For this alleged violation taken alone, the Hearing Panel recommended a private reprimand; and

(2) because Petitioner associated with Harmony Loan Company of Kentucky, its officers and directors, while Petitioner was an Ohio Judge and also [allegedly] permitted his name to be used publicly in connection with Harmony Loan Company, although he was not active in management and infrequently attended director's meetings, and because some [*highly questionable*] statistical evidence was produced by an investigative reporter allegedly disclosing favoritism existing in Judge Heitzler's Court, and because he ate lunch with certain attorneys who appeared before Petitioner in Court, then Petitioner had [allegedly] allowed his office to be used to bolster the private prestige of Harmony Loan Company in [alleged] violation of Canon 25; further, he was [allegedly] not indifferent to private, partisan influences and his conduct [alleg-

edly] gave the impression that a named attorney could unduly enjoy Petitioner's favor in alleged violation of Canons 13 and 34; and, finally, because Judge Heitzler hired an ex-convict who admittedly had a criminal record [but whose last felony conviction was in 1955] as an "usher" for persons with business before the various Domestic Relations Court rooms, and who [allegedly] was involved in an attempted bribery incident, and who was fired thereafter, then Petitioner allegedly violated Canon 12 by hiring one whom he knew or should have known was not possessed of the required character and fitness in alleged violation of Canon 12. For all these alleged violations considered together the Hearing Panel recommended an indefinite suspension; and

(3) because, during a *prior term of office* while Petitioner was a Municipal Judge, in Ohio, and while a director of Harmony Loan Company of Kentucky, Petitioner signed orders only in uncontested cases involving garnishment proceedings, default judgments, etc., wherein Harmony Loan Company was a party. This constituted an alleged violation of Canons 4, 13, 25, 26, 29 and 34. No evidence of any harm done to any of the litigants was presented, but the Hearing Panel nonetheless, recommended a public reprimand for the signing of these orders.

The *final recommendation* of the Hearing Panel, viewing the charges "cumulatively" was that Petitioner be indefinitely suspended from the practice of law.

The *same day* the Panel Findings were filed with the Board of Commissioners on Grievances and Discipline,

August 4, 1972, a two and one half hour meeting of the seventeen-member Board of Commissioners on Grievances and Discipline[4] of the Supreme Court of Ohio was held. See the excerpt of the minutes, Appendix pp. A-96 to A-97. Only fifteen of the seventeen members were present. Two were absent and one Board member, Gordon H. Scherer, an attorney from Hamilton County, Ohio, although present, *allegedly* did not discuss nor vote in the proceedings. Nonetheless, Gordon H. Scherer who was present during the deliberations of the Board, had previously testified for the Bar Association as a prosecution witness and was also the person who had "previously played a key role in launching the scheduled Grand Jury investigation of the Hamilton County Domestic Relations Court" seeking to have Judge Heitzler indicted. See the news article, Appendix pp. A-98. The Ohio Grand Jury did *not* return a true bill and Gordon H. Scherer, in his testimony before the Hearing Panel was "very critical" of the Prosecutor's handling of the case. During his testimony before the Hearing Panel, Scherer quoted with obvious displeasure large portions of the Grand Jury report. T-900 to T-904. As well, Scherer was the only member of the seventeen-man Board that was from Hamilton County.

Furthermore, three members of the Board who sat in Case No. 168, the present case, had also sat as the Hearing Panel in Case No. 172, a pending companion case which was later dismissed but involving other disciplinary charges filed against Petitioner, and which charges grew out of and were a direct result of the testimony given in Case No. 168. Case No. 168 was

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[4]Hereinafter called the Board.

heard in December of 1971, and Petitioner gave testimony during the hearings. The hearings before the Hearing Panel in Case No. 172 were held in May of 1972. Then in September of 1972, the Board's determination was finalized in Case No. 168.

Because of the presence of Gordon H. Scherer, and because of the unfair composition of the Board, Petitioner challenges the impartiality of the Board and the impartiality of the Findings made by the Board.

Thus, on September 1, 1972, the Board filed their Findings of Fact and Recommendation of the Board[5] with the Secretary of the Board, and in turn, with the Supreme Court of Ohio, which report was virtually identical in each and every respect and almost verbatim with the one previously rendered by the Hearing Panel. Again, the recommendation was that Petitioner be indefinitely suspended from the practice of law. Appendix pp. A-38 to A-59.

On the same day the Board Findings were filed, Chief Justice C. William O'Neill entered an Order To Show Cause in the Supreme Court of Ohio wherein Petitioner was directed to show cause why he should not be indefinitely suspended from the practice of law. Appendix pp. A-60 to A-61.

Petitioner and his counsel did not learn of the action of the Hearing Panel *or* the Board until the night of September 1, 1972, *when they read in the newspapers* that the Board had filed their Board Findings with the Secretary of the Board, and in turn, with the Supreme

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[5]Hereinafter called Board Findings.

Court of Ohio. No formal notice from the Secretary, or the Board, was received until September 5, 1972.

Immediately thereafter, one of the attorneys of record telephoned the Secretary of the Board and requested, upon behalf of Petitioner, a copy of the Panel Findings and was told the same was not available to Petitioner. The same day, Petitioner's counsel wrote to the Secretary of the Board again requesting that report, which request was also apparently ignored.

Thereafter, Judge Heitzler personally wrote to the Secretary of the Board requesting a copy of the Panel's Findings. Finally, on September 20, 1972, approximately forty five days after being filed with the Secretary of the Board, and nineteen days after the Board had filed its Findings, a copy of the Panel's Findings was sent to Petitioner.

On September 7, 1972, a *Per Curiam* Opinion was rendered by the Supreme Court of Ohio without notice or hearing in effect holding that Petitioner could:

> ". . . hear no further cases or other matters . . . until [the Supreme Court of Ohio] renders its decision and judgment in the matter." 31 Ohio St. 2d 187 (1972). Appendix, pp. A-61-62.

On September 8, 1972, Chief Justice O'Neill entered an Order without notice or hearing carrying into effect the mandate of the *Per Curiam* Opinion. Appendix pp. A-62 to A-63. A retired Judge of the Court of Common Pleas was then temporarily appointed to fill the vacancy.

Judge Heitzler responded by filing a *pro se* Motion for Reconsideration and for a Hearing, with the Supreme Court of Ohio (Appendix pp. A-64 to A-72) in which he stated that the action taken by the Court on September 7, 1972, was taken without notice, without giving him or his counsel an opportunity to be present, and that neither the Ohio Constitution, Article IV, Section 5, nor Governing Rule V or VI, upon which the removal was based, granted any authority either express or implied for the action taken by the Court. Petitioner further alleged that his removal contravened Article I, Sections 1 and 16, of the Ohio Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution. This Motion was not granted.

On or about October 5, 1972, because of the withdrawal of Cincinnati counsel, newly obtained counsel of record sought leave to appear and argue in the Supreme Court of Ohio on behalf of Petitioner, and by Order dated October 6, 1972, the Motion was granted. Appendix p. A-73.

Next, on October 17, 1972, Petitioner filed a Motion to Quash and Dismiss the Findings of Fact and Recommendation of the Board . . . and Motion to Dismiss and Recuse Each and Every Board Member of the seventeen-man Board.[6] Appendix pp. A-74 to A-105.

In the Motion to Quash, Petitioner challenged the Board Finding that Petitioner had violated Canon 25 by being a member of the Board of Directors of Harmony Loan Company. Petitioner submitted that he had conformed to the basic judicial standard in the

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[6]Hereinafter referred to as Motion to Quash.

community because *eight other Judges in Cincinnati, Ohio*, sat on Boards of Directors of named lending institutions. An affidavit listing these eight other Cincinnati Judges who sat on these various Boards of Directors appears in the Appendix at pp. A-100 to A-101.

Petitioner also denied that he had permitted his name to be used in a prospectus in connection with the sale of debentures of Harmony Loan Company, and further denied that he permitted his name and biography to be used in these prospectuses. To the contrary, the address of Petitioner was incorrect and the biographical information was incorrect. Affidavits by Petitioner and by the Vice President of Harmony Loan Company conclusively proved that Judge Heitzler not only did not permit his name to be used by Harmony Loan Company, but in fact, he did not know of its use. Appendix pp. A-98 to A-99. Further, Petitioner contended that since Canon 25 of the Canons of Judicial Ethics did not specifically prohibit a Judge from being a member of a Board of Directors, but only prohibited one from allowing the power of his office or name to be used for influence, then upon the facts and evidence submitted, Petitioner was not guilty of a violation of Canon 25.

Also attacked in the Motion to Quash was the Board Finding concerning Petitioner's alleged violation of Canon 12 by hiring Rufus "Snowshoe" Smith as a "glorified usher" for the Domestic Relations Court, knowing that Rufus had a past criminal record. Judge Heitzler contended that he was merely conforming to the standard of hiring personnel working for Hamilton County and with those standards set by the American Bar Association for rehabilitation of convicts. An

affidavit listing the results of an investigation of the employment of ex-convicts in Hamilton County disclosed that *four other men* working for Hamilton County had prior criminal records—some involving serious crimes. Appendix pp. A-101 to A-103. As such, Petitioner submitted that he was not guilty of a violation of Canon 12 of the Canons of Judicial Ethics.

Petitioner thus asserted that his First, Fifth, Sixth, Ninth and Fourteenth Amendment rights had been infringed by the Board Findings—hence they should be quashed and dismissed.

As additional evidence, and in opposition to the Board Findings concerning the *alleged* impression of impropriety created, Carol Chasteen Heitzler and Judge Heitzler's son both submitted affidavits to the effect that the Judge and Carol Chasteen were not living together prior to their marriage. Appendix pp. A-104 to A-105. For these reasons, Petitioner contended that no violation of Canon 4 occurred.

Judge Heitzler also challenged, in the Motion to Quash the removal Order of September 8, 1972, prohibiting him from performing any judicial functions until the Supreme Court of Ohio acted on the merits of the disciplinary charges. Petitioner asserted that he was denied a hearing on the question of his removal temporary or otherwise, was denied those rights guaranteed to him by the applicable Ohio statutory procedure for the removal of a Judge (O.R.C. §2701.11 and §2701.12), and was denied the due process of removal of a Judge as required by the Rules of Court for the removal of Judges, Government Rule VI. Petitioner further asserted that Article IV, Section 5, of the Ohio

Constitution, concerning the rule-making authority of the Supreme Court of Ohio, could not serve as a basis for the suspension of a judge without notice or hearing, without the right to confront his accusers and without right to counsel. If it did so authorize the Supreme Court of Ohio to so act, then such Ohio Constitutional provisions were in derogation of the United States Constitution, and as well, in derogation of the constitutional rights of the people of the State of Ohio who chose Judge Heitzler as their duly elected and qualified Judge. As such, Petitioner contended that he had the right to remain in his judicial capacity unless and until he was removed in accordance with the statutes and rules of court of the Supreme Court of Ohio.

Petitioner prayed in his Motion to Quash that the September 8, 1972, Order be set aside; that the Board Findings and Panel Findings be quashed and dismissed; that Case No. 168 and Case No. 172 be dismissed because the proceedings were "tainted". Alternatively, Petitioner sought to dismiss and recuse each Board member in Case No. 168 and Case No. 172, and that the Board and Panel Findings be quashed and dismissed and the entire case remanded to a new and unbiased Board and Panel and, of course, that the removal Order of September 8, 1972, be rescinded.[7]

Petitioner next filed his formal objections to the Findings of Fact and Recommendation of the Board[8] on October 20, 1972. Appendix pp. A-106 to A-119. Petitioner objected to each and every facet of the dis-

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[7]No action was taken on the Motion to Quash until the Supreme Court of Ohio rendered its final opinion indefinitely suspending Petitioner on December 15, 1972.

[8]Hereinafter referred to as Objections.

ciplinary proceedings against him, and to each and every finding and recommendation rendered by the Board. Those arguments and other evidence presented in the Motion to Quash were incorporated by reference as part of the Objections, because the Supreme Court of Ohio had not yet ruled on that Motion.

Filed as part of the Objections was additional evidence which consisted of an affidavit of Rufus Leo "Snowshoe" Smith denying that while he was an employee for the Domestic Relations Court, he ever engaged in any [attempted bribery] activities, and an affidavit of Rufus' attorney explaining that Rufus exercised his "Fifth Amendment" rights in the Panel Hearings when questioned about his alleged activities because of then pending Grand Jury proceedings against him *inter alia*. Appendix pp. A-116 to A-118. The Objections, like the Motion to Quash prayed for a dismissal of the proceedings against Judge Heitzler.

The Supreme Court of Ohio scheduled a hearing on the merits and oral argument for November 15, 1972. Counsel for Judge Heitzler and the same three members of the Cincinnati Bar Association, who originally filed the Complaint against Judge Heitzler, appeared, oral argument was held and was recorded. The matter was taken under advisement and on December 15, 1972, the Supreme Court of Ohio rendered their *Per Curiam* Opinion, and by Order entered by C. William O'Neill the same day, Judge Heitzler was indefinitely suspended from the practice of law. Appendix pp. A-119 to A-145. The Supreme Court of Ohio all at the same time denied Petitioner's Motion to Quash, overruled Petitioner's Objections, and affirmed the Board's find-

ings and recommendation that Petitioner be indefinitely suspended from the practice of law.

A prompt Motion to Stay Execution of the Order Pending Application to this Honorable Court, filed on or about December 22, 1972, for a Writ of Certiorari, was denied by Entry of the Supreme Court of Ohio, dated January 12, 1973. Appendix pp. A-145 to A-148.

It is the *Per Curiam* Opinion confirming the indefinite suspension of Petitioner from the practice of law, the final Order entered thereto, and the flagrant violations of Petitioner's various constitutional rights through the disciplinary proceedings conducted against him, that necessitates this Petition for a Writ of Certiorari.

I.

Because the hearing panel gave petitioner the right to file a brief on the merits of the grievance charges filed against him but then decided the case on the merits without ever giving petitioner the opportunity to file his brief, and because the hearing panel violated their own ruling as to briefs on the merits, petitioner has been denied procedural due process, has been denied the effective assistance of counsel, and has been deprived of his right to counsel.

Petitioner submits that in a disciplinary proceeding involving a lawyer or a judge, that the defendant is entitled to due process of law and as such, once the Hearing Panel sets forth a well-defined time schedule for filing post-hearing briefs by all parties, the Hearing Panel must be required to abide by their own ruling

as to such time schedule and not be permitted to decide the merits of the case in advance of the filing of Petitioner's Brief.

The Hearing Panel ruled that the Bar Association would have two weeks following the Hearing Panel's ruling on the Motion to Dismiss the Supplemental Complaint within which to file its Brief on the merits of the disciplinary charges. Judge Heitzler was to have two weeks following the receipt of the Bar Association Brief within which to file his Brief. T-1402, 1403.

Notwithstanding this clearly-defined time schedule, the Hearing Panel, without the benefit of Briefs on the merits from either party, filed its Findings of Fact and Recommendation of the Hearing Panel with the Secretary of the Board of Commissioners on August 4, 1972. The Motion to Dismiss the Supplemental Complaint was sustained and the Hearing Panel *simultaneously* ruled on the merits of the disciplinary charges against Petitioner. (Appendix pp. A-18, A-33 to A-35) all in direct contravention of the Hearing Panel's own ruling. T-1402, 1403.

The Bar Association conceded this point when R. O. Klausmeyer, Counsel for the Cincinnati Bar Association, in his cover letter to the Board of Commissioners, dated August 9, 1972, enclosing the Bar Association Brief on the merits of the charges against Petitioner, admitted, and in fact, recited in part, the time-table set out at T-1402, 1403 and conceded that, by filing the Brief early,

> ". . . relator does not intend to impose any additional obligations on the part of respondent.

> It is simply that the brief has been ready for some time . . ."

Further, the Supreme Court of Ohio, in its *Per Curiam* Opinion readily admits that with respect to the filing of post-hearing Briefs, ". . . there was some confusion as to the time for filing briefs with the hearing panel, . . ." but the Supreme Court of Ohio concludes that,

> ". . . respondent was not prejudiced in this regard [because the] hearing panel and board determined the matter prior to the actual filing of briefs by either relator or respondent [and furthermore,] Gov. R. V confers no right upon either relator or respondent to file briefs either before the hearing panel or the board, and the filing of same is a matter within the discretion of the board or hearing panel." Appendix p. A-128.

The rationale of the Supreme Court of Ohio in this regard is clearly wrong. First, it must be conceded that the Hearing Panel gave Petitioner a *right* to file a Brief on the merits of the charges against him and then *cut off that right* by deciding the case on the merits without this Brief ever being filed, and without notification to Petitioner.

Second, while the Hearing Panel concededly filed their findings on August 4, 1972, and the seventeen-man Board also met the same day and "rubber-stamped" almost verbatim the Hearing Panel's report, nonetheless, the Bar Association filed its Brief on the merits on or about August 9, 1972, and the report of the Board of Commissioners was not formally filed

with the Supreme Court of Ohio until September 1, 1972, *AFTER* the Bar Association filed its Brief. Furthermore the Bar Association Brief became, as of August 9, 1972, a part of the record in this case, entitled to, and obviously given great weight by the Supreme Court of Ohio in rendering its final opinion. Does due process permit the Bar Association to brief the merits of certain disciplinary charges, and cut off Petitioner's right to respond and present his case?

Third, part of the rationale for submitting Briefs on the merits was to recommend what punishment Petitioner could receive assuming the charges embodied in the Complaint were found to be true. T-1403. Petitioner never had an opportunity to make any recommendations as to the penalty to be imposed until he was first able to raise the issue of the undue "harshness" of the indefinite suspension in Petitioner's formal Objections, (Appendix p. A-113) and Brief, filed months after the Hearing Panel had already decided the case on the merits and recommended an indefinite suspension, and long after the Board "rubber-stamped" the Hearing Panel findings. Thus, not only was Petitioner denied the right granted to him to brief and argue the very merits of the disciplinary charges against him, but he likewise was clearly deprived of making any recommendations whatsoever as to the penalties to be imposed if the charges against him were found to be substantiated.

The Supreme Court of Ohio attempts to justify the unconstitutional conduct of the Hearing Panel by begging the essential question involving the violation of Petitioner's procedural due process. If in fact the filing of a merits Brief and notice and an opportunity to be

heard were a matter of discretion as the Ohio Supreme Court holds, it is abundantly obvious that the discretion to require or not require the filing of merit Briefs should have been made at the close of the hearings and the Hearing Panel must be bound by their own ruling in this regard. If no Briefs were to be filed, then none should have been permitted. If merit Briefs were to be permitted, the Hearing Panel must be required to abide by their own ruling and Petitioner should have been allowed to file his Brief. And even if we assume *arguendo* that the filing of Briefs was and is discretionary, it would be hard to envision a case presenting a clearer abuse of such discretion by the Hearing Panel.

Fourth, the Supreme Court of Ohio attempts to further justify the Hearing Panel's conduct by holding that:

> "Respondent was given every opportunity to present any relevant evidence that he desired to present to the hearing panel." *Per Curiam* Opinion, Appendix, p. A-128.

This holding not only misses the issue of procedural due process here presented but creates a classic legal "red herring". Petitioner may have had an opportunity to present "any relevant evidence" at the hearing, but *after* the hearings, Petitioner, pursuant to the Panel's own ruling, had the right to file post-hearing Briefs commenting critically on the Bar Association's position, and also, assuming the charges could be substantiated, commenting on the penalty to be imposed. Quite obviously, Petitioner was not going to introduce *more* evidence via his post-hearing Brief — only comment critically upon the Bar Association's charges and what penalties could be imposed. The Supreme Court of

Ohio's holding in this regard completely confuses the issue involving the denial of Petitioner's procedural due process.

This Honorable Court and many other courts have repeatedly held since 1883 that procedural due process in a disciplinary hearing requires that one be given notice of the charges against him and an opportunity to be heard. *Ex Parte Wall*, 107 U.S. 265 (1883); *In re Ruffalo*, 390 U.S. 544 (1968) reh. den. 390 U.S. 961; *In re Ming*, 469 F.2d 1352 (7th Cir. August 2, 1972); *In re Echles*, 430 F.2d 347 (7th Cir. 1970); *Wilbur* v. *Howard*, 70 F. Supp 930 (D.C., E.D. Ky. 1947) rev'd. *Howard* v. *Wilbur*, 166 F.2d 884 (6th Cir. 1948).

Simply put, the Sixth Amendment right to counsel, and the Fifth and Fourteenth Amendment rights to due process of law require that the Hearing Panel be bound by its own rulings concerning the filing of merit Briefs in disciplinary cases. To permit the indefinite suspension Order rendered by the Supreme Court of Ohio against Petitioner to stand is tantamount to paying but lip service to procedural due process. For this reason alone, Certiorari should be granted.

II.

Because Gordon Scherer was a member of the Board Of Commissioners and sat in on the very deliberations and voting of the Board Of Commissioners, and because Scherer was a chief witness for the Bar Association, had testified as to alleged illegal activities of Petitioner before the Hamilton County Grand Jury, and was highly critical of the Prosecuting Attorney's handling of The Grand Jury proceedings, then the deliberations of the Board were subject to grave questions concerning their impartiality and their deliberations, findings and recommendations as affirmed by The Supreme Court Of Ohio violated due process of law.

Petitioner submits that the impartiality of the deliberations of the Board of Commissioners are open to grave questions reaching due process proportions. Gordon H. Scherer, a member of the Board of Commissioners was a "key figure" in the grand jury investigation conducted to ascertain if Petitioner was engaged in any illegal activities in the Hamilton County Court. The Grand Jury did *not* return an indictment against Petitioner. (Appendix, p.A-98) During the disciplinary proceedings before the Hearing Panel, Scherer expressed obvious displeasure with the fact that Judge Heitzler was not indicted. T-899-903

Furthermore, not only was Scherer a member of the Board of Commissioners who sat through the entire deliberations of the Board concerning the merits of Petitioner's case and what penalty, if any, would be recommended concerning Petitioner, (See the exerpt of the minutes provided to counsel for Petitioner, Appendix, pp. A-96-97) but Scherer was the *only* member

of the Board from Hamilton County, Ohio. Obviously if the Board of Commissioners reviewed the evidence at all or gave even the most cursory consideration to the Hearing Panel findings, then Scherer's testimony was given great weight.

The only response from the Supreme Court of Ohio was to hold in conclusory terms that:

> "Although a member of the board was a witness for the relator, the minutes of the board clearly indicate that such member 'took no part in the discussion or voting' in the case." (Appendix p.A-128)

This conclusion cannot save the entire proceedings from the substantial possibility of prejudice that must arise when the chief prosecution witness is permitted to sit with the jury while the jury is sitting to decide the fate of another.

It is hard to believe, indeed impossible to imagine that the sole member of the Board of Commissioners from Hamilton County who had testified in an attempt to have Petitioner indicted, and who gave 40 pages of transcribed testimony before the Board of Commissioners in disciplinary proceedings seeking the removal of Petitioner from office sat stone faced, impartial and dispassionate through a 2½ hour meeting and never once gestured, indicated, or otherwise showed satisfaction or displeasure with the proceedings then in deliberation. It strains credulity to believe the other Board members could sit and impartially weigh what evidence they considered with Scherer present.

Petitioner submits that it is unnecessary to establish what actually transpired during the deliberations of the Board of Commissioners in a case such as this. The mere presence of the prosecuting witness or the prosecutor himself in the jury room during deliberations of the petit jury would alone, be enough to require a verdict to be set aside. If the due process of law required by *Re Ruffalo*, 390 U.S. 544 (1968), the first class citizenship for attorney's *Spevack* v. *Klein*, 385 U.S. 511 (1967), and the fundamental sense of fair play are to be more than constitutional rights to be exercised in a vacuum, then Certiorari should be granted on this point alone.[9]

III.

Because Petitioner was not given an opportunity to file exceptions to, or to attack the findings of fact and recommendations of the hearing panel before the Board filed its findings with The Supreme Court Of Ohio, or in the alternative, because the Board Of Commissioners failed to make an independent determination of the record, exhibits and transcript, then Petitioner was denied due process of law, notice and an opportunity to be heard, and was denied the right to counsel.

On August 4, 1972, the Hearing Panel filed its 21 page Findings of Fact and Recommendation of the Hearing Panel with the Board of Commissioners on

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[9]The disciplinary procedures for lawyers and judges in the State of Ohio needs to be reviewed by this Honorable Court. For example, this Court held over four years ago in *In Re Ruffalo*, 390 U.S. 544 (1964) that Ruffalo was denied due process, yet the Ohio Supreme Court has refused to reinstate him. 45 Ohio Bar 1654, December 4, 1972, D.D. 57.

Grievances and Discipline of the Supreme Court of Ohio. (Appendix, p.A-16) Also filed with the 17-man Board was a *1408* page transcript of the testimony taken at the hearings.

The *very same day* the Hearing Panel's findings and the 1408 page transcript were filed, the Board met for a 2½ hour session wherein *matters other than Petitioner's case* were considered. See the extract of that portion of the minutes of the Board furnished to counsel, (Appendix, pp.A-96, 97). Interestingly, the Findings of Fact and Recommendation of the Board of Commissioners are almost an identical recital of the Findings of Fact and Recommendation of the Hearing Panel. Compare Appendix, pp.A-38 to A-59 with Appendix, pp.A-16 to A-37. Petitioner respectfully submits that no member of the Board of Commissioners (except the 3 Panel members) could have read the 1408 page transcript during the 2½ hour meeting, nor could they have considered the evidence in any manner other than perfunctorily. The obvious conclusion is that the Board has done far more than "adopt" the findings and recommendation of the Hearing Panel. Rather the Board instead has illegally and unconstitutionally delegated its supervisory and fact-finding capacity to the Hearing Panel and then "rubber-stamped" the Hearing Panel findings, all in violation of Petitioner's due process rights, to *full* and *fair* and *impartial* disciplinary proceedings.

Furthermore, Petitioner was not given any notice whatsoever of the filing of the *Hearing Panel* findings and was not given the right to file any objections or exceptions to the findings of the Hearing Panel. Quite

obviously if the consideration to be given a disciplinary case by the Board is to be anything other than a "rubber-stamping" process, then Petitioner deserved the right to object and except to the Hearing Panel's findings and report prior to its filing same with the Board.

But even beyond the above-stated procedural infirmities, Petitioner was given no notice that the *Board of Commissioners* itself was going to make its decision and was not given an opportunity to appear before the Board and present his views concerning the applicable law and facts before the Board rendered its Findings of Fact and Recommendation.

Therefore, not only was Petitioner not given an opportunity to file objections and exceptions with the Hearing Panel, but no notice of the filing of the findings of either the Panel or the Board was given, and clearly, the abbreviated time within which the entire record of this case was reviewed precluded any meaningful independent review of the testimony by the Board—an obvious duty the Board had, unless, of course, the three-man Hearing Panel is to report to the seventeen-man Board of Commissioners only as a matter of form.

Petitioner therefore submits that *In re Ruffalo*, 390 U.S. 544 (1968); *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Ex Parte Wall*, 107 U.S. 265 (1883); and *In re Ming*, 469 F.2d 1352 (7th Cir. 1972) all would require nothing less than that the Board of Commissioners refrain from filing its Findings of Fact and Recommendation until it gave Petitioner notice, the right to be heard, the right to counsel, the right to object and except to the findings and recommendations

of the Panel, and the right to discuss the effect of the evidence adduced in the 1408 page transcript, as well as the right to Brief the issues of law. Alternatively, the Board had the duty to conduct an independent study of the evidence, the exhibits and the testimony. Otherwise the seventeen-man Board of Commissioners on Grievances and Discipline becomes nothing more than a three-man Hearing Panel and fourteen "yes-men" "rubber-stamping" the already grevious infringements of Petitioner's procedural due process.

The Supreme Court of Ohio attempts to answer these arguments at Appendix, pp.A-129 to 130. The Ohio Supreme Court places great reliance in *Mahoning County Bar Association* v. *Ruffalo*, 176 Ohio St. 263 (1964) for the proposition that the Supreme Court of Ohio is the ultimate fact-finder in disciplinary cases. But the Court concedes that the Board of Commissioners acts as an arm of the Supreme Court in effect eliciting these facts.

Petitioner respectfully submits that this is a clear-cut admission of the serious duty devolving upon the Board to independently view the evidence because three Board members sit as the Panel to hear and take testimony. These men ideally file their impartial and objective facts of a case. It takes little prescience of mind to readily admit that by the time the record and all the evidence reaches the Supreme Court of Ohio, it, like most other appellate records, is "cold" at best. Great weight must then be given to the factual findings below, but only if the facts have been subjected to the crucible of the adversary system and only if a fair and impartial analysis has been made—a facet not present in the instant case.

Furthermore, the Ohio Supreme Court argues in its Opinion, (Appendix, p. A-130, 131) that because Count 2 (relating to a Bar Association trip to Majorca, Spain), Count 3 (relating to two Mexico trips) and Count 11 (relating to alleged nepotism in the hiring of Petitioner's son and daughter) were dismissed, then this illustrates the fairness of the proceedings to which Petitioner was subjected. Quite obviously the three-man Hearing Panel who was present for the six days of testimony, felt that the evidence did *not* support misconduct findings as to Counts 2, 3 and 11. Hence, they were dismissed. But one cannot logically contend that because the Hearing Panel fully and fairly evaluated some of the evidence, and then dismissed certain charges, that this illustrates a "fair procedure." Rather, it illustrates only that the Bar Association had not carried its burden of proof.

Because of the serious constitutional questions raised in this argument, Certiorari should be granted.

IV.

Because the disciplinary proceedings conducted against petitioner who was a Judge and not a Practicing Attorney were conducted pursuant to Gov. R. V of The Supreme Court Rules for the Government of The Bar Of Ohio dealing with disciplinary procedure for Attorneys rather than pursuant to Gov. R. VI dealing with the removal of Judges in a case where Petitioner is charged with violations of the Canons of Judicial Ethics, the entire disciplinary proceedings are void AB INITIO because of a lack of jurisdiction.

Petitioner submits that the Supreme Court of Ohio did not have jurisdiction to suspend or disbar a judge for alleged violations of the Canons of Judicial Ethics or for alleged conduct occurring while Petitioner held a judicial office under Gov. R. V. Instead, Gov. R. VI and Ohio Revised Code, Sections 2701.11 and 2701.12, which deal with the removal of Judges, are the sole, exclusive, and jurisdictional provisions for the removal of judges, and, therefore, all proceedings conducted under Gov. R. V are void.

To the contrary, the Supreme Court of Ohio, (Appendix pp. A-131 to 134) holds that Gov. R. V relating to disciplining attorneys and Gov. R. VI relating to judges are "not mutually exclusive". The court bases this conclusion upon an expansive reading of Gov. R. V and upon the Ohio Supreme Court decision in *Mahoning County Bar Association* v. *Franko*, 168 Ohio St. 17 (1958) which, in effect, holds that attorneys who are judges must maintain their status as attorneys

in order to comply with the statutory requisites that judges be attorneys. Then, holding that it,

> ". . . might be a more logical procedure, in cases of lawyers who are judges, to first proceed under Gov. R. VI for removal from office, and then proceed under Gov. R. V with respect to disciplinary action as a member of the legal profession, we find no error or prejudice . . ." Appendix p. A-133.

The Supreme Court of Ohio holds in effect that Petitioner's then counsel waived any error that was inherent in such procedure by proceeding under Rule V rather than Rule VI. Appendix pp. A-133, 134.

Respondent respectfully submits that the *Franko* case was not the law of the State of Ohio after the passage of Ohio Revised Code, Sections 2701.11 and 2701.12, and since the adoption by the Ohio Supreme Court of Gov. R. VI (formerly Rule XXI). O.R.C. Sections 2701.11 and 2701.12 were passed by the Legislature of the State of Ohio October 30, 1965, and Rule XXI was adopted by this Court on February 11, 1966, both after the *Franko* decision.

In addition, Ohio Constitution, Article II, Section 38, provides in effect that laws shall be passed providing for the removal of all officers including judges for misconduct, et cetera.

O.R.C. 2701.12 provides:

> "(A) Cause for removal or suspension of a judge from office without pay under Section 2701.11 of the Revised Code exists when he has,

since first elected or appointed to judicial office . . .

"(3) Been disbarred or suspended for an indefinite period from the practice of law for misconduct occurring *before such election or appointment.*" (Emphasis supplied.)

The obvious intent of the Legislature in the passage of such statute was to provide for those circumstances in which a judge was guilty of misconduct before *first* assuming judicial office for which conduct he could be suspended or disbarred, and that 2701.11 and 2701.12 come into play as the sole and exclusive method for removal of judges for misconduct occurring after the judge *first* assumed judicial office.

All of the alleged misconduct in this case is alleged to have occurred after Judge Heitzler *first* assumed judicial office.

When *Franko* was decided, the only rule in existence was what is now Gov. R. V, and there was no legislative enactment such as O.R.C. 2701.11 and 2701.12. Hence *Franko* was a correct pronouncement of the law at the time it was decided.

Petitioner does not deny that it is a judicial function to supervise lawyers and the Bar of the State, however, he does respectfully submit that it is a combined legislative and judicial function to discipline judges for alleged violations of the *Canons of Judicial Ethics* occurring *while they are judges.* Hence, the Supreme Court of Ohio would be without jurisdiction to suspend or disbar a judge under Gov. Rule V for conduct occurring while Petitioner was a judge which would have the

effect of removing him as a judge because a judge must, in Ohio, be in good standing at the Bar. Such a rule would permit circumvention of the clear dictates of the legislative enactments above referred to, and would be in the contravention of Gov. R. VI of the Rules for the Government of the Bar of Ohio.

The Constitution of the State of Ohio above referred to delegated the authority for removal of judges to the Legislature. As such, the Legislature adopted O.R.C. §2701.11 and 2701.12, and the Supreme Court of Ohio then adopted Gov. R. VI in accordance therewith.

We are not unmindful of the fact that Gov. R. V contains language relating to judges. However, when Gov. R. VI was adopted, that language of Rule V relating to judges was superseded and made ineffective by the provisions of Rule VI. In the case of *In re Nevius*, 174 O.S. 560 (1963), the Supreme Court of Ohio itself held that the adoption of a Supreme Court Rule superseded the disciplinary procedures existing by statute at the time Nevius was disbarred. The *Nevius* case involved his application for reinstatement. Hence, the Supreme Court of Ohio had already said that the later passage of a rule dealing with disciplinary proceedings causes an earlier provision in contradiction to that rule to be superseded.

Petitioner also submits that this matter is jurisdictional and cannot be waived.

In the instant case, Judge Heitzler was tried as a *lawyer* under Rule V *for violation of Canons of Judicial Ethics* which immediately gives rise to serious questions of law. A judge, in the State of Ohio, is guaranteed, by virtue of the aforementioned constitu-

tional provision, legislative enactments, and Gov. R. VI of the Rules for the Government of the Bar of Ohio, certain substantive and procedural rights governing disciplinary procedures, among which are the right to have five judges hear his case, to insist upon clear and convincing evidence, to establish any claim against him, which were the very rights denied Heitzler in the instant disciplinary proceeding. The law in the State of Ohio has been formulated to protect the electorate from being denied their right to choose their public officials, including judges. The cases establish the principle that a judicial officer or other officer of this state may not be removed, once he is elected to office, for conduct occurring prior to that election. Otherwise, the voters would be disenfranchised. Judge Heitzler was elected Judge of the Court of Common Pleas of Hamilton County the last time in November 1968, and took office the first of 1969. Much of the conduct alleged against him occurred prior to that date and cannot now be used to remove him from office. The conduct alleged against him occurring subsequent to that date entitles the voters and the citizens of this state to have removal proceedings against the judge conducted in accordance with the statutory provisions above mentioned and in accordance with disciplinary Rule VI of this Court.

The Ohio case law regarding the removal of a public official from office for alleged misconduct is clear and unequivocal on this point. The acts which form the basis of the alleged misconduct *must* have occurred during that official's present term of office.

This is clearly established in *State Ex. Rel. Stokes* v. *Probate Court*, 22 O.S. 2d 120, 258 N.E. 2d 607

(1970), in *McMillen* v. *Diehl*, 123 O.S. 212, 190 N.E. 567 (1934); and in *State Ex. Rel. Vogt* v. *Donahey*, 108 O.S. 440, and 140 N.E. 609.

In *Donahey* the Governor of Ohio attempted to remove the Mayor of Massilon for alleged misconduct which had occurred during a previous term of office. The Supreme Court of Ohio reversed the order of removal, holding that the Governor had no right to remove the Mayor for cause arising from a previous term, and saying,

> "It is not the purpose of the provision of the Constitution requiring the Legislature to enact laws providing for the prompt removal from office of officers guilty of misconduct . . . to vest in the Governor of the State or any other tribunal, a veto power upon the right of the electors of the municipality to elect their own City officials, the right being to remove for cause, which cause must arise during the term, and subsequent to the exercise of the power to elect vested in the electors of a municipality."

This principle was again recognized in the later case of *McMillen* v. *Diehl*, 123 Ohio St. 212, 190 N.E. 567 (1934), where the Supreme Court of Ohio held that to remove a Judge of the Court of Common Pleas, the cause of removal must have arisen during his term and after his election. In reaching this decision, the Supreme Court of Ohio cited the *Donahey* case, *supra*, and once again pointed out that to remove a public official from office for misconduct during a prior term would, in effect, veto the right of the public to elect their own officials.

All of the above cases are cited as precedent in the most recent decision in point handed down by the Supreme Court of Ohio. In *State Ex Rel. Stokes* v. *Probate Court*, 22 Ohio St. 2d 120, 51 O.O. 2d 180, 258 N.E. 2d 607 (1970), a complaint was filed against the Mayor of Cleveland alleging misconduct while in office. The alleged misconduct was committed in a previous term, and again the Supreme Court of Ohio affirmed the dismissal of the complaint on the basis of the *Donahey* and the *McMillen* cases cited herein. In reaching this decision the Court said:

> "In absence of clear legislative language making conduct in prior terms a ground for removal from office . . . [the conduct] alleged as ground for removal must occur during the term from which removal is sought and be subsequent to the exercise of the power to elect vested in the electors of the Municipality."

The *Stokes* case clearly indicates the present status of the law of Ohio which the Supreme Court of Ohio ignored in the instant case.

In those states where specific methods for removal of a judge are provided (*as is now the case in Ohio*), the courts have taken the view that misconduct in his official judicial capacity could not be the basis for disbarment or other disciplinary proceedings against an attorney, theorizing that to allow such proceedings would give to improper authorities the right to control, supervise, or remove judges; and, therefore, the proceedings must be in accordance with legislative enactments. *In re Jones*, 202 La. 729, 12 So. 2d 795 (1943); *In re Watson*, 71 Nev. 227, 286 P. 2d 254 (1955); *Weston* v. *Board of Governors of State Bar*, 177 Okla. 467,

61 P. 2d 229 (1936); *Chambers* v. *Central Committee*, 203 Okla. 583, 224 P. 2d 583 (1950).

In the *Chambers* case, *supra*, the Court granted a writ of prohibition directed to the Bar Association to halt proceedings involving a disciplinary complaint aganst Chambers. In so doing, the Court held that the Bar Association was without jurisdiction to proceed against the Judge because of his judicial position. The Court succinctly stated the dangers of permitting the removal of a judge by proceeding against him as a lawyer at 224 P. 2d 583, 586-587 as follows:

> ". . . as we have heretofore pointed out, [this] could not accomplish any good, but would result in nothing more than discord, and could result in confusion, pernicious partisan political activity concerning the judiciary, and other results not beneficial to the administration of justice, or desirable in connection with the service to be rendered by the bench and bar."

In Re Jones, 202 La. 729, 12 So. 2d 795, 797 (1943), the Court stated:

> ". . . to permit the disbarment of a district judge during his tenure of office, when one of the constitutional requirements for his holding such office is that he must be an attorney-at-law, would be to sanction the doing indirectly of that that cannot be done directly, that is, his removal from office by reason of disqualification."

See also: *In re Strahl*, 201 App. Div. 729, 195 N.Y.S. 385 (1922); *In re Gibbs*, 214 N.W. 850 (S.D. 1927); *State Bar* v. *Superior Court*, 278 P. 432 (Cal. 1929).

Petitioner therefore submits that permitting the Bar Association to proceed under Gov. R. V, rather than under Gov. R. VI, and O.R.C. 2701.11 and 2701.12, the specific precise, exclusive and jurisdictional provisions for the removal of judges is to circumvent the Ohio Constitution, ignore a clear legislative mandate, disregard the applicable rule of court and deprive Petitioner of due process of law. For these reasons Certiorari should be granted.

V.

Because three members of The Board Of Commissioners in the Instant Case had sat as the Haring Panel in a Companion Case involving different disciplinary charges but growing out of testimony already given in the Instant Case, then the Board must be considered tainted, and the entire proceedings were conducted in violation of Petitioner's Fifth and Fourteenth Amendment due process rights.

Three members of the Board of Commissioners who discussed and voted in the instant case, Case No. 168, had sat as the Hearing Panel in Case No. 172, a companion case to the instant proceeding but based on a different set of facts. Petitioner submits therefore, that due process of law prohibits conduct such as this and raises additional questions as to the impartiality of the Board proceedings.

It is obvious that the three members of the Board of Commissioners who sat also as the Hearing Panel in Case No. 172, have played a dual role and have been privy to information that undoubtedly improperly influenced their judgment.

Thus, the Supreme Court of Ohio is clearly wrong when it holds at Appendix p. A-129 that, "Furthermore there could be no predudice to respondent in any event, since the action of the board was unanimous." If the Board is composed according to law, seventeen members sit on a Board of Commissioners on Grievances and Discipline. The very minutes of the Board itself show that two members were absent. Appendix, p. A-96. Next, Gordon H. Scherer, the "key prosecution witness" allegedly did not discuss nor vote in the proceedings. Appendix, p. A-97. This leaves only fourteen members. If we then eliminate the three Board members who played a dual role by sitting as the Panel in Case No. 172 and as Board members in Case No. 168, then we are left with only eleven impartial members—a far cry from a "unanimous" decision.

Equally specious is the holding of the Supreme Court of Ohio at Appendix p. A-129, which in essence states that there is "no indication" that the Board did not decide the merits of the charges against Petitioner on any basis other than the pleadings and evidence presented. This circular reasoning entirely ignores the thrust of Petitioner's argument, viz there is present in the instant case the substantial possibility that the proceedings were not conducted in an impartial manner. It is respectfully submitted that this court would never permit a jury verdict to stand under such circumstances, and further, should a judge have independent knowledge concerning a person whose rights were being considered, which knowledge might consciously or unconsciously prejudice his impartiality, then the Code of Judicial Ethics would prohibit such judge from passing on the merits of the charges in that situation.

The same issues are presented in the instant case. Case No. 168 was heard in December of 1971. Case No. 172 was heard in May of 1972. Determination by the Board was finalized and filed in Case No. 168 in September, 1972. The charges in Case No. 172 grew out of and were a direct result of the Board's investigation in Case No. 168.

Thus, the findings of the Board were based on evidence presented to a Board of Commissioners which was subject to the substantial possibility of prejudice—all in violation of Petitioner's Fifth and Fourteenth Amendment rights to due process. The Board members were sitting to determine Petitioner's very basic right to practice law, act as a judge, and make a living. Certainly those members of the Board who had played a dual role should have *sua sponte* recused themselves from any participation in the case. For these reasons Certiorari should be granted.

VI.

The holding of The Supreme Court Of Ohio that Petitioner left the appearance of unlawful cohabitation with Carol Chasteen, now Petitioner's wife, in violation of Canon 4 of The Canons of Judicial Ethics is unsubstantiated and is violative of due process.

The Supreme Court of Ohio in their Opinion, Appendix p. A-134, holds that:

> "The findings of the board that the respondent's personal behavior in his everyday life, while a judge gave the appearance of impropriety and was not beyond reproach (Count I)

and constituted a violation of Canon 4, is supported by, and required by, the evidence."

While it is not Petitioner's desire to burden this Honorable Court with an analysis of 1408 pages of testimony, even the most cursory glance at the transcript citations that follow, pointedly demonstrate that the Supreme Court of Ohio is utterly mistaken regarding the "appearance of impropriety."

During the latter part of 1969 until September of 1970, Petitioner was legally separated from his wife and was living with his son, Geoffrey, who was partially invalided following serious surgery. Appendix, pp. A-44-46. The Board had no doubt that Petitioner and Carol Chasteen (now Mrs. Heitzler) gave Petitioner's son excellent and continuous care. Geoffrey's own doctor so testified and the Board agreed. Appendix, p. A-45.

Also uncontroverted is the fact that from late 1969 until 1970, Petitioner lived in an apartment complex containing 400 to 450 apartments and containing over 1,000 people. T-13 and 1042.

Out of all these people, the Bar Association could dredge up only two to testify as to any alleged appearance of impropriety. Both witnesses *had previously appeared before Judge Heitzler* in his judicial capacity, and both exhibited such bias as to render their entire testimony subject to the grave question of whether it had *any* probative value whatsoever.

The first witness who testified against Petitioner was Miss Gabriella Bode who moved into the apartment complex under the false name of Gabriella Greco (T-1024) in December of 1969. T-377.

Miss Bode stated:

> "Well, I saw her [Carol Chasteen] when I moved in. Well, I moved in two weeks before the first of the year. I saw her in January and then she was gone for a long time, and then I saw her back for several months, and then they moved." T-379.

This testimony is repeated on cross-examination. T-390.

Petitioner and Miss Chasteen were married in November of 1970, and continued to live in the apartment complex until April, 1971. Miss Bode's testimony makes it quite clear that any impression she acquired with respect to the conduct of Petitioner and Miss Chasteen had been acquired "several months before they moved" and during the five months prior to the time when Petitioner moved from the apartment complex. Since Judge Heitzler and Miss Chasteen were married during the time period described by Miss Bode, the apparent manifestation of cohabitation would not and could not be improper.

Miss Bode's testimony also reflects that she had appeared before Judge Heitzler prior to giving her testimony before the Hearing Panel. T-387. "I went in front of the Judge (with respect to child support) in July, 1970." Other examples of Miss Bode's bias against Petitioner are numerous. She testified that she became acquainted with Petitioner during his campaign for office, T-376. She further testified that she approached

the Petitioner on behalf of Mr. Nicolas Greco, who was a friend of hers. She stated on examination, T-381:

> "George, Judge Heitzler—I called him George —What are you doing to Nick? This is Nick, you know, what are you doing to him"

She then testified that Petitioner had ordered Mr. Greco to pay $35.00 per week alimony to his wife and that the two were still married at that point in time. She then said, T-382:

> "Why are you doing this" and "What are you doing to Nicholas?" And further at T-384, "I kept asking him over and over why he was doing the things he was doing and I told him I didn't think it was fair, or it was right."

The second witness who testified against Judge Heitzler was Mr. Nicholas Greco who moved into the apartment complex at the same time that Miss Bode moved in (T-568) and the two were neighbors (T-1025). The apartment rented by Miss Bode was "across the hall from Nick Greco." T-1025.

Mr. Greco testified that he had seen Carol Chasteen on Petitioner's balcony "several times" during the time period Mr. Greco and Judge Heitzler both occupied apartments in the apartment complex. *One time*, according to Mr. Greco, he saw Miss Chasteen "shaking out a rug in her robe." However, when he was closely questioned, Mr. Greco *could not specify precisely when the rug shaking instance occurred.* Hence, it is not clear, even in Greco's mind, as to whether this occurred *prior to or subsequent to* Petitioner's marriage to Miss Chasteen.

Other examples of Mr. Greco's bias are reflected in the transcript. Mr. Greco had been arrested six times for child neglect, T-587, and appeared before Petitioner in Municipal Court on August 11, 1968, on a charge of disorderly conduct, T-583. Mr. Greco appeared in Domestic Relations Court "18 or 19 times," T-590, and was held in contempt three times, T-596, and sentenced to 30 days in jail, T-592, which sentence was suspended by Petitioner.

Mr. Greco had, on several occasions, sought to have Miss Bode intercede on his behalf with respect to some legal matters dealing with Judge Heitzler's court. The result of such attempts was, however, a full explanation by Judge Heitzler of the necessary steps to be taken in the appellate process, T-577, and nothing more. *All of this had occurred prior to Mr. Greco's testimony* before the Hearing Panel.

Other obvious incidents of bias are reflected by the following remarks made by Mr. Greco which are taken from the transcript:

> "And I said I didn't care what it cost, that the decision the Judge had made was foul and he knew it was foul and I knew it was foul and everybody else knew it was foul. . ." T-601.

Mr. Greco was "extremely unhappy" with the result of his divorce case. T-602. He stated:

> ". . .this divorce stunk . . . in the beginning. I knew there was a payoff. I have no witnesses. I can't prove it . . ." T-602. "Look me in the eye, Judge, $750.00 you got, and Mr. Stone got $250.00 . . ." T-603. ". . . they didn't award her everything until the Judge got the payoff. . . ." T-607.

Further, Greco's personal opinion of Judge Heitzler was as follows. Greco stated:

> "How can he possibly hurt me? I said: "He done took everything I had, he wouldn't let me speak in Court, he wouldn't let my attorney speak" T-581.

Probably the most extreme example of bias on Mr. Greco's part is reflected at T-609 wherein Greco admitted that he saw Petitioner and his son leave the apartment complex for work, *but would not admit that Petitioner and his son lived together, a fact which is beyond question.*

The above incidents are but a few of the numerous instances of incredible and obvious bias on the part of Mr. Greco. As noted above, Miss Bode and Mr. Greco were *the only two witnesses* the Bar Association could dredge up to offer testimony regarding this charge.

The evidence presented by Petitioner was far more credible and impartial. Judge Heitzler called Mr. Charles Wurster who was the rental agent and manager of the apartment complex. His testimony, T-1020-1029, reflects the following: That approximately 1,000 people were residents of this apartment complex; that Miss Bode lived right across the hall from Mr. Greco; that Miss Bode registered for the apartment as Gabriella Greco; that later she changed this application to read Gabriella Bode; and that Vincent Greco, who is Nicholas Greco's brother, was living there with Gabriella Bode at the apartment complex. None of this testimony was controverted.

Additionally, Mr. Wurster's testimony reflects *that he never had a complaint of any kind* regarding the conduct of either Judge Heitzler or Miss Chasteen in any respect during the entire time Petitioner resided in the apartment complex.

Mr. Wurster further testified that Miss Chasteen:

> "Occasionally came in about 7:30 to 9:00 in the morning, and shortly thereafter leave with Jeff; and occasionally I saw her return with Jeff at approximately 4:30, and thereafter leave."

It is interesting to note that he never saw Petitioner and Miss Chasteen either enter or leave the apartment together prior to their marriage. T-1043.

Mr. Wurster's testimony regarding Judge Heitzler's son Jeff is completely corroborated by Dr. Gail Englander's testimony that Jeff must be "forced to take medication," T-1068, and "Miss Chasteen brought Jeff to the doctor's office," T-1069. "Also, Jeff is not capable of taking his morning medication . . . Miss Chasteen took him to psychiatrists, to Dr. Shelbourne, and called me regarding medication . . . and saw that he had his medication." T-1069.

Mr. Wurster's testimony regarding Miss Bode and her relationship with Vincent Greco is corroborated by Mr. Nicholas Greco who stated: "Mr. Vince Greco lived directly across the hall from me with a Miss or Mrs. Gay Bode." T-590.

Hence, of the three witnesses to testify on this charge, Mr. Wurster is by far the most credible. As

well, it is highly significant that out of one thousand (1,000) occupants of the apartment complex, the only two witnesses presented by the Bar Association to support the charge of Petitioner's alleged improprieties with Miss Chasteen were two people obviously biased against and displeased with Judge Heitzler, and of definitely questionable character.

It is of particular interest that Miss Bode chose to "assume" that the Petitioner and Miss Chasteen were "living together," and further, that Judge Heitzler's conduct was "improper" when in fact she made part of her observation while *she was herself living with another man who was in fact not her husband.*

It is also interesting to note that Mr. Greco, while making the same "observation" and "assumption" as was made by Miss Bode, was seeking Miss Bode's assistance to get a "better deal" from Judge Heitzler, to get him to go "his way," and to "see what you can do for me."

Mr. Greco's record, with respect to his marital problems, and his problems ensuing from his failure to support his children by a former marriage, are included herein as they relate to Petitioner. The most significant analysis of the testimony of the Bar Association's two witnesses to this charge is as follows: both lack credibility; both are biased; and neither can place the time when they say Petitioner and Miss Chasteen were living together, when they did live together for five months as husband and wife, as they were married.

The above facts congently demonstrate that the Bar Association failed to call other witnesses from the

apartment complex because the testimony would be unfavorable; i.e., no one else, out of 1,000 people, came forward to testify as to improper conduct on the part of Petitioner.

Furthermore, reference is made to the affidavits of Carol Heitzler and Geoffrey Heitzler in Petitioner's Motion to Quash and Dismiss, (Appendix pp. A-104, 105) in support of the proposition that Petitioner and Carol Chasteen Heitzler never cohabited prior to their marriage in November 1970.

It is, therefore, submitted that the holding of the Supreme Court of Ohio is so clearly erroneous and based upon such biased and incredible evidence so as to infringe due process. For this reason, Certiorari should be granted.

VII.

Because Petitioner did not know of the unauthorized use of his name in connection with Harmony Loan Company of Kentucky, in which he sat as a member of the Board of Directors, and because The Ohio Judicial standards permit a Judge to sit on Boards of Directors, and because Petitioner did not allow the power of his office or the influence of his name to be used to assist the business of another, and because the Supreme Court of Ohio based their opinion upon conduct which cannot be constitutionally prescribed, the holding that Petitioner violated Canons 13, 25, 33 and 34 is unfounded, violates due process and freedom of association.

Petitioner has presented uncontradicted evidence via affidavits which are now part of the record in this

case wherein Judge Heitzler specifically denies any knowledge of the use of his name in any prospectuses, (Appendix p. A-98) and the Vice-President of Harmony Loan says by affidavit that the publication of all the names of Board members was required by Kentucky securities law. Further, Mr. Spampinato admits that Judge Heitzler had no knowledge of the use of his name. Appendix p. A-99. See also T-461.

Despite this affirmative evidence, and despite the fact that the Supreme Court of Ohio holds at Appendix p. A-135 that serving on Boards of Directors is not prohibited by the Canons of Judicial Ethics, the Court nonetheless holds that Petitioner had an affirmative duty to insure that his name was not misused. Appendix p. A-136. This seems to be an arbitrarily strict holding in view of the fact that Judges obviously would and undoubtedly did invest in out-of-state enterprises.

Petitioner expressly denied that his conduct in any way suffered the impression that another person could improperly influence him and expressly denied as well that his judicial life was in any way affected by his social or business relationships.

Turning first to the implications of a judge associating and "lunching" with one's friends, the Supreme Court of Ohio found this conduct in violation of the Code of Judicial Ethics. Appendix, p. A-137. To the contrary, Petitioner submits that any attempt to regulate Petitioner's conduct in this regard violated Petitioner's freedom of speech and association. It is readily conceded that members of the legal profession are subject to regulation in order to maintain high standards

of ethical conduct. Yet, it must also be conceded that lawyers are "first class" citizens. This Honorable Court has so held. *Spevack* v. *Klein*, 385 U.S. 511 (1967).

In Re Stolar, 401 U.S. 23 (1971) an appeal was taken to the United States Supreme Court by an applicant for admission to the Ohio State Bar. The applicant refused in part to disclose to the Ohio Bar Committee a list of all organizations of which he was or had been a member. He also refused to disclose all organizations of which he was or had become a member since registering as a law student.

Because of these refusals, both the Ohio Bar Committee and then the Ohio Supreme Court denied Stolar's application to take the bar examination. On appeal, this Honorable Court reversed and held at 401 U.S. 27, 28 that:

> "In our view requiring a Bar applicant to answer these questions is impermissible in light of the First Amendment, as was made clear in Shelton v. Tucker, 364 U.S. 479, 5 L.Ed.2d 231, 81 S.Ct. 247 (1960). At issue in Shelton was an Arkansas statute that required every state teacher, as a condition of employment, to file an affidavit listing every organization to which he had belonged within the preceding five years. The Court noted that this requirement infringed upon the teacher's right to freedom of association because it placed 'pressure upon a teacher to avoid any ties which might displease those who control his professional destiny . . .' "

The analogy between *Stolar* and the case at bar is clear. To make one's luncheon friends the subject of a judicial

reprimand is tantamount to restricting those persons with whom a judge may associate. See e.g., Opinion 322 rendered by the American Bar Association on May 18, 1969, and reported in 55 A.B.A. Journal 666 - 668 (1969) entitled "Conduct of Judges".

Furthermore, even if we assume *arguendo* that the judge's luncheon habits could be characterized as creating the impression of favoritism, this alone is not sufficient to constitute an ethical violation. The mere impression that Judge George S. Heitzler's favor was unduly enjoyed by another is not enough. An overt act of favoritism *must* be shown. In *McMillen* v. *Diehl*, 123 Ohio St. 212, 190 N.E. 567 (1934) the issue was raised of judicial impropriety because a judge had borrowed money from several attorneys who participated in trials in which the judge made rulings. The Court stated at 190 N.E. 567, 568 that:

> "We strongly disapprove the practice of an incumbent judge borrowing money from lawyers who practice before him— . . . However, *in order to make a case for moral turpitude, evidence should be produced tending to show that, because of such borrowing, the incumbent discriminated in favor of the attorneys and others from whom he borrowed.* If such causal connection be shown, this would make a case of 'misconduct in office involving moral turpitude', as charged in the complaint." [Emphasis added.]

Applying the *McMillen* test to the case at bar, there is absolutely no evidence to support a finding of a violation of Canon No. 13, i.e. that Petitioner "suffer[ed] his conduct to justify the impression that his favor was unduly enjoyed by another."

The only statement referring to a violation of this Canon is that of the Board wherein it states, "Added to such evidence was the fact that respondent was a frequent luncheon companion of said attorney." The only evidence presented to sustain this charge was Petitioner's own testimony, T-36 and Frank Weikel's T-1298. At T-36 Petitioner stated in answer to a question regarding the members of his luncheon group:

> "It would be myself, Judge Mathews, Mr. Peter Donohue from my office, Mr. Crisci, Mr. Donald Swallow, Mr. Stone, Judge Chase Davies was there quite often, the late Chief of Police, Colonel Jacob Schott."

Also, Frank Weikel stated T-1298 that not only did he attend the luncheon regularly, but also Judge William S. Mathews, Mr. Ralph Crisci, Judge Paul Gilday, Mr. Swallow, Mr. Stone attended. At T-1299 it is stated:

> "This was one of the reasons for me going to these luncheons because there was a lot of political figures that would come in and out, and so forth, and I would pick up quite a bit for the column, and on occasion you name the courthouse and they were there."

This was the only evidence presented to justify the impression of favoritism. Nowhere does the record reflect that anyone at anytime felt that this luncheon group justified the impression that:

> "There was one who practices before respondent who could unduly enjoy respondent's favor,"

Nor is there any testimony even inferring such an unjustifiable conclusion.

Petitioner thus submits that the evidence elicited with respect to Judge George Heitzler's luncheon companions violated his freedom to speak to whom he pleased, his freedom to associate with whom he chose, and the conclusion by the Board regarding any impression of favoritism violated the First and Fourteenth Amendments of the United States Constitution. Furthermore, no evidence has been presented to even intimate that having lunch with Judge Heitzler in anyway created or caused any alleged favoritism. The holding of the Supreme Court of Ohio in this regard is unconstitutional, violative of Ohio case law, and based on totally inadequate evidence.

Further, Petitioner was charged with being "not indifferent to partisan influences" in violation of Canon 34.

Petitioner presented the Chairman of the Domestic Relations Committee of Hamilton County, Edward C. Benson, who testified that he was "in court daily"; "never observed favoritism", T-1257, and that the Court was "very efficient", T-1271. He expressed his high opinion of the Judge and the Court, T-1271. In regard to favoritism he stated "I have never heard any from any other attorneys . . ." T-1280.

It would appear that if there was any favoritism, the Chairman of the Domestic Relations Committee who was present in court almost every day would have been aware of that favoritism.

Others who testified as to the non-existence of favoritism included the following attorneys: Dale Schmidt T-1181, Jerome Schimpf T-1183, Jon Jacobs T-1183,

Anthony Dittmeier T-1184, Marvin Kolstein, Robert Sand, Morris Sullivan T-1186 to 1187, all being active in Domestic Relations Court practice.

Even the Bar Association's witness, Richard Rawe, City Editor of the Cincinnati Post and Times-Star, who had published numerous articles concerning the investigations stated: "Whether there was actual favoritism, I was not able to determine it, No" T-687, and could not form an opinion as to favoritism T-693.

Mr. Benson's testimony is even more important regarding partisan influence at T-1271:

> "I had some misgivings about what my position would be in that Court since I did not know Judge Heitzler other than to say "Hello" to him, and hadn't done that in more than five or ten times since before he came on the bench. *I had been a very close personal friend of Judge George who was his predecessor and political opponent, so I didn't know exactly what my position was going to be.* As things turned out my reception under his regime was no different than any other that I had with any of the other judges and in the conduct of our Court of Domestic Relations Committee, he was interested in trying to put into effect certain changes in the methods of procedure of handling of cases which turned out very well, particularly on the hearing of motions, on settings of motions, and in conjunction with our committee so that we wouldn't be wasting a lot of time sitting around, and this has worked out very effectively." [Emphasis added.]

Petitioner submits that he did not violate Canons 13, 25, 33 or 34 of the Canons of Judicial Ethics and

as such the charges are unfounded, violate due process, and the freedom of association.

VIII.

Although Judge Heitzler, while a Judge of a Municipal Court in Ohio, signed numerous orders, only in uncontested cases, this will not support a finding and judgment against Petitioner for alleged violations of Canons 4, 13, 25, 26, 29 and 34, and such findings contravene due process.

Petitioner is charged with having signed entries (orders) while on the bench as a municipal judge in a prior term of office in cases in which a company in which he was a director was involved in violation of Canon 4, 13, 25, 26, 29 and 34.

The Bar Association offered a report during the hearings regarding the entries signed by Judge Heitzler. This exhibit reveals conclusively that Petitioner tried *no contested case* involving the Harmony Loan Company. This court's attention is respectfully directed to T-369 and T-370 wherein the Court Clerk testified. The Clerk noted that the only entries Judge Heitzler signed were default judgments, garnishments, continuances and entries to set aside defaults and dismissals.

Mr. Morris Leher testified that he is the long-time Chairman of the Municipal Court Committee for the Cincinnati Bar Association (T-1157), and in that position he called dockets, and disposed of cases, and had a Judge sign the necessary entries (T-1159), and grant the defaults, continuances, and garnishments

(T-1161). He stated that he had no authority to sign any entry (T-1162), but that an attorney would make up an entry, present same to a Clerk who would assemble them in numerical order and take them to a Judge for signature (T-1175). In addition to his hearing of these cases, he also stated that two other attorneys heard these matters, and proceeded in the same manner as he had. T-1177.

The finding by the Board and the Ohio Supreme Court that Judicial Canons were violated in this regard is based on two misconceptions of the Ohio Law.

First, the Board, while admitting these acts of signing orders did not occur within Petitioner's current term as Common Pleas Judge, nevertheless held this charge to be a violation of Judicial Ethics. By this ruling the Board is attempting to exercise a veto power upon the right of the electors to elect their own Judges.

The Ohio case law regarding the removal of a public official from office for alleged misconduct is clear and unequivocal on this point. The acts which form the basis of the alleged misconduct must have occurred during that official's present term of office.

The leading case in point is *State Ex Rel. Vogt* v. *Donahey*, 108 O.S. 440, 140 N.E. 609, discussed *supra*. See also *McMillen* v. *Diehl*, 123 O.S. 212, 190 N.E. 567 (1934) discussed *supra*. Finally, see the recent decision of *State Ex Rel. Stokes* v. *Probate Court*, 22 O.S. 2d 120, 51 O.O. 2d 180, 258 N.E. 2d 607 (1970) *supra*.

Interestingly, the Supreme Court of Ohio seeks to escape the above precedent by *relying* on Code 2701.12

concerning the removal of judges (Appendix p. A-140), when they are so insistent elsewhere in their opinion that Rule V not Rule VI (Rule VI having been promulgated for the removal of judges) is the applicable procedure for removing a judge from office. This glaring inconsistency in the reasoning of the Ohio Supreme Court only amplifies the fact that Rule VI is the proper rule regarding the removal of judges, but since Rule V was utilized instead, and since the Supreme Court of Ohio seeks to justify the use of Rule V by the Bar Association, then one can only conclude that Rule VI and its statutory counterparts, O.R.C. 2701.11 and 2701.12, have no applicability. Therefore, the *Stokes* case and its predecessors are the proper law to be applied and assuming *arguendo* Petitioner's conduct was erroneous, such acts occurred during a prior term of office and cannot now be raised. *State Ex Rel. Stokes* v. *Probate Court, supra.*

Secondly, Petitioner submits that the signing of the entries in the various proceedings constituted only a ministerial-administrative act and was not a violation of judicial ethics.

Petitioner submits that the law of Ohio is stated in 31 O. Jur. 2d 448 *Ministerial or Formal Acts.* It provides:

> "Mere formal or ministerial acts may be performed by a judge, even though he is interested in the cause, without making such acts subject to collateral attack. Thus, where the only action of an interested Judge is to make a formal entry of a default judgment in a case in which the proceedings are all regular, such judgment is not void and cannot be collaterally attacked."

In 31 O. Jur. 2d, at page 377, we find:

> "The rendition of a judgment is a judicial act; while its entry upon the record is merely ministerial."

Petitioner submits that the finding of the Board and Supreme Court of Ohio (Re: signing entries of Harmony Loan) is contrary to the law of Ohio, does not show any violation of the Canons of Judicial Ethics, and is not substantiated by the evidence, all in violation of due process.

IX.

Because Petitioner hired a man who had a previous criminal record, but whose last felony conviction was 1955, to a nonsensitive position, as an usher, then a finding that such conduct constituted a violation of Judicial Canon 12 is violative of due process.

Petitioner admittedly hired Rufus Smith as a constable (usher) for his Domestic Relations Court. However this was done in the spirit of rehabilitation of ex-offenders and clearly within the guidelines set by the American Bar Association:

> "Employment is an important factor in successful reintegration of the offender in society. This study points out the fact that employment does not mean just getting a job, it also emphasizes the importance of the right job and maintaining a reasonable length of employment." American Bar Association Report, *Offender Employment Review*, (March, 1972)

In the American Bar Association's Commission on Correctional Facilities and Service, Coordination Bulletin

No. 5 (February, 1972), the following statement is found:

> "*Objective.* Both within the nation's criminal justice community and among the public at large, there has been increasing recognition of the critical importance of employment to effective offender rehabilitation. Nevertheless, a variety of obstacles faces the released offender who wishes to rejoin the outside community and the world of responsible work. These include employer attitudes and policies, adverse public opinion, lack of up-to-date vocational preparation and, the offender's own psychological problems and hesitancy in the difficult challenge of rejoining the 'free community.'"

The law of Ohio is in accord as to rehabilitation. See *Kearns*, 28 Ohio St. 2d 121 (1971). Mr. Smith's record reveals that he was arrested 50 times, but was released outright six times, and had charges dismissed 29 times (T-361). Costs were remitted or assessed seven times (T-361), and Rufus was charged with only a single felony of which he was convicted on January 26, 1955, (T-362) served his time, was released, and since then there have been no felony convictions. Mr. Smith was last convicted of a misdemeanor in April, 1966, and assessed costs remitted (T-362). A search of his record (Hearing Panel Exhibit No. 13) reveals that for the most part his arrests were caused by domestic problems with his wife, who dismissed at least 12 of these charges (T-361).

During his service with Petitioner, there were no arrests or infractions of the law. It seems reasonable that a man whose only felony conviction was in 1955 should be given every opportunity to rehabilitate himself in a nonsensitive job.

The Supreme Court of Ohio relies upon the testimony of Dr. Reuben Richardson to support its finding of a violation of Canon 12. Dr. Richardson stated that Mr. and Mrs. Atkins "introduced him" to Rufus Smith (T-409), that "he gave Rufus Smith $1,000 in the presence of the Atkins" (T-411 and 412). What the Board and the Supreme Court of Ohio have failed to consider is the testimony of Mr. and Mrs. Atkins given before the Grand Jury, the Bar Association, and the Hearing Panel. Mrs. Atkins stated that she "did not know Rufus Smith," had never seen him or met him (T-962), "did not give any money to Rufus Smith or anyone . . . did not receive a receipt . . . that she testified to this before the grand jury." T-963-64.

Ben Atkins testified that he knew Rufus Smith, but had never discussed Rufus with Dr. Richardson or anyone, that he did not introduce Mr. Smith to Dr. Richardson—did not give Rufus any money—did not receive anything—did not see any money passed (T-987-88). It should be noted that Mr. Atkins also testified before the grand jury. The grand jury, after hearing this evidence, did not return any indictment against Rufus Smith, stating:

> "Whereas, there seems to be no lack of rumors of bribery or attempted bribery, there has not been sufficient concrete evidence to substantiate these charges or to justify the return of indictments . . . It is also to be noted that certain witnesses were violently prejudiced against the [Domestic Relations] Court and are engaged in personal vendettas. There is no question that some of these persons were looking for an opportunity to bribe but sometimes compounded the difficulty of weighing and shifting the evidence."

It is submitted that the grand jury did not find any probable cause that Mr. Smith should stand trial, although considering the same evidence received by the Hearing Panel.

As to Petitioner's reaction, when Mr. Smith was accused of misconduct, Mr. Wunker stated he "had a purported tape conversation with Mr. Smith," and Judge Heitzler replied: "Bring in the tape, and you and I will go straight to the county prosecutor" (T-534). *Instead, Mr. Wunker gave the tape to a local paper (T-536).* When some concrete evidence rather than pure conjecture was finally presented to the Petitioner regarding Rufus Smith, he was discharged.

We submit that having served his time, Mr. Smith deserved a chance to rehabilitate himself in a nonsensitive job—that the incident related by Dr. Richardson did not take place, and the Hamilton County Grand Jury so found—and that Petitioner's activities did not in any way violate Canon 12. Further, Rufus Smith has denied receipt of any of the alleged bribes. (Appendix, pp.A-116,117)

Again, Petitioner knows of many ex-offenders with past records who are employed by the County in various jobs. (See Appendix, pp. A-101-103). This is the standard in the community.

To hold that the employment by a Court of an exconvict who acts only as a runner is contrary to the modern thinking of those who believe that it is the responsibility of the Courts and of the Bar to do all within their power to make available responsible jobs for those unfortunate members of our society who have been convicted and who have paid their debt to society.

A finding in this regard is against the evidence, in violation of due process, and Certiorari should be granted.

X.

Even assuming *Arguendo*, Petitioner has been guilty of some misconduct in office, the indefinite suspension levied upon him is far too severe a penalty, and as such, Contravenes Due Process.

The Bar Association after many months and thousands of hours of investigation, has examined, explored and probed in depth, every facet and recess of the Petitioner's life and all that probing, searching and examination brought to light only the few matters upon which the Supreme Court of Ohio saw fit to indefinitely suspend Petitioner.

The intense investigation of the Petitioner included a Grand Jury investigation, which investigation revealed absolutely no criminal conduct on the part of the Petitioner. The investigation included private investigators attempting to turn up any shred of evidence whatsoever which would incriminate or do harm to the Respondent. The local Cincinnati newspapers kept the entire investigation under the closest scrutiny and their reporters wrote daily reports regarding same. Judge Heitzler has not violated any Canons of Judicial Ethics.

Even if he was guilty of any violation of the Canons of Judicial Ethics, it shocks the sensibilities of one's imagination to think that the minor incidents upon which the proceedings have been predicated could re-

motely result in the removal of the Petitioner as a Judge.

It is necessary to look into Petitioner's background and past history to ascertain if the punishment that he has received is too severe.

Judge Heitzler received his law degree from Chase College in 1950 and has been involved in the practice of law ever since. He has served as Assistant County Prosecutor, First Assistant County Prosecutor (T-76 and 77) and has been in government service for approximately 18 years (T-77). He was also an Assistant United States Attorney for the Southern District of Ohio. He was a Municipal Judge for four years, and a Common Pleas Judge for four years.

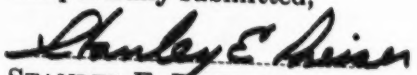
Judge Heitzler has been instrumental in assisting and aiding in Civic affairs of the City of Cincinnati since his entrance into the practice of law in 1950.

To permit the Supreme Court of Ohio's Order and Opinion to stand would result in an indefinite suspension of Petitioner as a lawyer and the removal of Petitioner as a Judge. Such consequences are not justifiable in the light of all the surrounding circumstances in this case, are unduly harsh, and deprive Petitioner of his property without due process of law.

CONCLUSION

For all the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

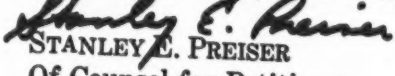


STANLEY E. PREISER
1012 Kanawha Boulevard East
Post Office Box 2506
Charleston, West Virginia 25329
Telephone: 304/344-9651

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Petition for Writ of Certiorari, and three true and correct copies of the Appendix, upon R. O. Klausmeyer, Esquire, 2900 DuBois Tower, Cincinnati, Ohio 45202; John J. Getgey, Esquire, 615 Provident Tower, Cincinnati, Ohio 45202; and upon C. Donald Heile, Esquire, 3005 Carew Tower, Cincinnati, Ohio 45202, Counsel of Record for the Cincinnati Bar Association, by depositing same in the United States mail, postage prepaid by air mail, this 14th day of March, 1973.



STANLEY E. PREISER
Of Counsel for Petitioner

72-1258

MAR 15 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1972

No. .....

GEORGE S. HEITZLER, JR.,
Petitioner,

v.

CINCINNATI BAR ASSOCIATION,
Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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APPENDIX

		Page
1.	Complaint and Certificate	A-1 to A-7
2.	Answer	A-7 to A-11
3.	Supplemental Complaint	A-11 to A-13
4.	Answer to Supplemental Complaint	A-14 to A-15
5	Findings of Fact and Recommendation of Hearing Panel	A-16 to A-37
6.	Findings of Fact and Recommendation of Board of Commissioners on Grievances and Discipline	A-38 to A-59
7.	Order To Show Cause, September 1, 1972	A-60 to A-61
8.	Per curiam Opinion, September 7, 1972	A-61 to A-62
9.	Order (Removing Petitioner as Judge pending action by the Supreme Court of Ohio	A-62 to A-63
10.	Pro Se, Motion for Reconsideration and For A Hearing	A-64 to A-72
11.	Entry (permitting new counsel to appear and setting due date for objections)	A-73

Page

12. Motion to Quash and Dismiss * * * and to Dismiss and Recuse ..... A-74 to A-105

13. Respondent's Objections to the Findings of Fact and Recommendations * * * of the Board ....A-106 to A-119

14. Order (by C. William O'Neil, Chief Justice, indefinitely suspending Petitioner) ..... A-119 to A-121

15. *Per Curiam* Opinion, December 15, 1972 (of the Supreme Court of Ohio passing on the Motion to Quash, the Objections, and indefinitely suspending Petitioner) ..... A-121 to A-145

16. Motion To Stay Execution of Court Order, Pending Appeal ....A-145 to A-147

17. Entry denying Motion to Stay Execution of Court Order Pending Appeal ..... A-147 to A-148

BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF THE STATE OF OHIO

IN RE:

Complaint against

GEORGE S. HEITZLER, JR.
Judge, Court of Common Pleas
(Division of Domestic Relations)
Hamilton County Court House
Court and Main Streets
Cincinnati, Ohio 45202
Respondent

No. 168

CINCINNATI BAR ASSOCIATION
125 East Ninth Street
Cincinnati, Ohio 45202
Relator

COMPLAINT AND CERTIFICATE
(Rules XVIII and/or XXI of
the Supreme Court of Ohio)

Relator alleges that George S. Heitzler, Jr., attorney at law, duly admitted to the practice of law in the State of Ohio, presently Judge of the Court of Common Pleas of Hamilton County, Ohio, Division of Domestic Relations since January, 1969, formerly Judge of the Cincinnati Municipal Court is guilty of the following misconduct:

1. Judge Heitzler while Judge of the Domestic Relations Court was separated from his wife. Starting in the latter part of 1969, until September, 1970, one Carol Chasteen, a divorcee, was present in Judge

Heitzler's apartment frequently. She was at his apartment, and was seen by other residents of the apartment complex, almost daily, at all hours of the day and night. The conduct of both Carol Chasteen and Judge Heitzler was such as to cause members of the apartment complex and others to believe that they were living together. Relator says that Judge Heitzler's actions were in violation of Judicial Canons 1, 4 and 34.

2. Judge Heitzler took a trip to Majorca in October, 1969 at his expense with Carol Chasteen. The trip to Majorca was sponsored by the Ohio State Bar Association. The first reservations made therefor by Judge George S. Heitzler were for himself and his "niece." On or about October 24, 1969, Judge Heitzler appeared with Carol Chasteen (who was not his niece) at the Columbus Airport, and in the presence of members of the public and members of the Ohio State Bar Association and their wives, engaged in offensive conduct with Carol Chasteen. During the course of the trip to Majorca of October 24, 1969, until November 3, 1969, when they returned to Columbus, Ohio, Judge Heitzler's conduct was offensive to other members of the Ohio State Bar Association and their wives. Relator says that Judge Heitzler's actions were in violation of Judicial Canons 1, 4 and 34.

3. On at least two other occasions while a judge, at times unknown to Relator, but by Judge Heitzler's own admission, he took trips to Mexico at his expense with Carol Chasteen on planes chartered or owned by Blue Horizons, a travel club or group. One of these trips was to Acapulco and the other, according to Judge Heitzler's statements was to Porto Majorta. On both

of these trips members of the public were present. Relator says that Judge Heitzler's actions were in violation of Judicial Canons 1, 4 and 34.

4. On a number of different occasions on Friday and Saturday nights at the Hotel Gibson, in downtown Cincinnati, Judge Heitzler was observed in a state of intoxication at the hours of 3:00 and 4:00 in the morning and conducted himself in a loud and offensive manner while he was a judge, all in violation of Judicial Canons 1, 4 and 34.

5. On a number of different occasions Judge Heitzler, while a judge, was observed entering suites or rooms upstairs in the Hotel Gibson in downtown Cincinnati where he engaged in immoral acts, all in violation of Judicial Canons 1, 4 and 34.

6. During the course of Relator's investigation of these matters, subsequent to Judge Heitzler's voluntary appearance to testify before certain members of Relator, to-wit in September or October, 1970, during Judge Heitzler's incumbency as a judge of the Court of Common Pleas (Division of Domestic Relations) while Judge Heitzler and his wife, Ruth, were domiciled in Ohio, his wife Ruth obtained a Mexican divorce from him. Thereafter in November, 1970, Judge Heitzler married Carol Chasteen in Newport, Kentucky. Relator says that Judge Heitzler's part in the obtaining of a Mexican divorce was in violation of Judicial Canon 4.

7. Judge Heitzler, for a number of years, while a judge invested the sum of $30,000.00 in Harmony Loan Company, a Kentucky corporation, in the form

of preferred non-voting shares and sub-ordinated debentures. In 1964, he became a Director of Harmony Loan Company with offices in Newport, Kentucky. Harmony Loan Company is a small loan company. Judge Heitzler became a Director without any thought of participating in management because, as a non-resident of the State of Kentucky, under Kentucky law, he could not become an investor in the company unless he was a Director or other "insider." Judge Heitzler did not actively participate as a Director, however, he did attend directors' meetings at which decisons were made relating to the business operations of Harmony Loan Company and, on one occasion was compensated for his attendance at such a meeting. Investments were made by Judge Heitzler starting in December, 1964, up to April 27, 1970. In addition to his own investments he made investments in his name of funds actually belonging to his son and to Carol Chasteen, both residents of the State of Ohio. Relator says that Judge Heitzler's actions in this regard were in direct circumvention of Kentucky laws and constitute a violation of Judicial Canons 1, 4 and 34.

8. On the Board of Directors of Harmony Loan Company have been Joseph Becker, Bailiff for Judge Heitzler in both Courts, and Robert Stone, a Cincinnati attorney who is a personal friend of Judge Heitzler, who appears with some frequency before Judge Heitzler, and frequently has lunch in a public restaurant with Judge Heitzler.

James J. Mathews, President of Harmony Loan Company was Treasurer of Judge Heitzler's campaign in 1968 for the Court of Domestic Relations.

Ralph Crisci, Chief Referee in Domestic Relations Court was at one time Assistant Vice-President and attorney for Harmony Loan Company.

Sylvan Reisenfield, attorney for Harmony Loan Company appears in the Domestic Relations Court before Judge Heitzler.

Harmony Loan Company has from time to time issued brochures which contain the pictures and identifying names of its Directors and officers, including Joseph Becker, Robert Stone and James J. Mathews, and Judge Heitzler.

Relator says that in knowingly associating with Harmony Loan Company and its officers and Directors and in permitting the publicity of his name as a Judge in connection with the business of Harmony Loan Company, Judge Heitzler has violated Judicial Canons 13, 25, 33 and 34.

9. Harmony Loan Company frequently brings actions in the Cincinnati Municipal Court. While a Judge of that Court, and a Director of Harmony Loan Company, Judge Heitzler signed 487 orders in 357 cases wherein Harmony Loan Company was a party. These included default judgments, orders in aid of execution and one judgment entry for the plaintiff Harmony Loan Company after trial.

The foregoing conduct constitutes a violation of Judicial Canons 4, 13, 25, 26 and 34.

10. Judge Heitzler, after assuming the office of Domestic Relations Judge, hired as a Constable one

Rufus, alias "Snowshoe" Smith, a man with a lengthy criminal record including felony charges. At the time Smith was hired, Judge Heitzler was aware of Smith's criminal record yet hired him for political reasons. The man was subsequently discharged because of alleged bribery attempts on his part involving Domestic Relations cases. Judge Heitzler's hiring of Smith was in violation of Judicial Canon 12.

11. Judge Heitzler also hired his son to work in the Court of Domestic Relations, and his daughter, on a seasonal basis, putting both of them on the payroll thereof, in violation of Judicial Canon 12.

THE CINCINNATI
BAR ASSOCIATION

By R. O. Klausmeyer
2900 DuBois Tower
Cincinnati, Ohio 45202

By John J. Getgey
615 Provident Tower
Cincinnati, Ohio 45202

By C. Donald Heile
3005 Carew Tower
Cincinnati, Ohio 45202

CERTIFICATE

The undersigned, C. R. Beirne, President of the Cincinnati Bar Association, hereby certifies that R. O. Klausmeyer, John J. Getgey and C. Donald Heile, are duly authorized to represent Relator in the premises and have accepted the responsibility of prosecuting the Complaint to its conclusion. After investigation,

Relator believes reasonable cause exists to warrant a hearing on such Complaint.

Dated August 11, 1971

C. R. Beirne, President

CINCINNATI BAR ASSOCIATION

BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF THE STATE OF OHIO

IN RE:

Complaint against

GEORGE S. HEITZLER, JR.
Judge, Court of Common Pleas
(Division of Domestic Relations)
Hamilton County Court House
Court and Main Streets
Cincinnati, Ohio 45202

No. 168

Respondent

CINCINNATI BAR ASSOCIATION
125 East Ninth Street
Cincinnati, Ohio 45202

Relator

ANSWER

Respondent admits that he is an attorney at law duly admitted to practice in the State of Ohio; that, since January, 1969, he has been a duly elected Judge of the Court of Common Pleas, Hamilton County, Ohio, Division of Domestic Relations, and prior to said date, was a Judge of the Cincinnati Municipal Court.

1. Respondent admits that since, and prior to, January, 1969, he has been separated from his wife and did employ one, Carol Chasteen, as an attendant for Respondent's afflicted son who resided with Respondent. That Respondent in so doing did not violate any Judicial Canon and did not live with the said, Carol Chasteen.

2. Respondent admits that in October, 1969, he did travel to Majorca but states that he made no reservation for a "niece" and at no time prior to, on, or after said travels did he engage in any kind of offensive conduct and, therefore, did not violate any Canon of Judicial Ethics.

3. Respondent admits that he did travel on airplanes with one, Carol Chasteen, but specially and specifically denies that, at any time with the said, Carol Chasteen or with any other person, he engaged in any course of offensive conduct.

4. Respondent admits that he has, on occasion, individually and with others, been to the Gibson Hotel, Cincinnati, Ohio, but denies that he was ever loud or offensive at any time, and further denies that he conducted himself in any manner, save and except, that in keeping with his elected position.

5. Specially and specifically, Respondent denies that he, at any time, engaged in any immoral conduct at the Gibson Hotel or elsewhere and demands strict proof thereof.

6. Respondent admits that during his service as a Judge of the Court of Common Pleas, Hamilton

County, Ohio, his wife, Ruth, obtained a decree of divorce from him and that thereafter, he did marry Carol Chasteen, but that in his said wife's divorce proceeding, he violated no Canon of Judicial Ethics.

7. Respondent admits that:

A. He had certain monies on deposit in the Harmony Loan Company.

B. That he did become a Director of the said Harmony Loan Company, but did not, at any time, actively participate in the business operations of said Company.

C. That he did not directly or indirectly circumvent Kentucky Statutes or in any of his actions or activities with Harmony Loan Company violate any Canon of Judicial Ethics.

8. Respondent admits the allegations contained in Paragraph 8 of said Complaint and Certificate filed herein, but specially and specifically denies that he violated any Canon of Judicial Ethics.

9. For want of knowledge, Respondent denies the representations made and contained in Paragraph 9 of said Complaint and Certificate and further asserts that the same cannot be herein considered for the reason that such acts, if any, did not occur within Respondent's current term of office. (*McMillen vs. Diehl, 128 O. S. 212; State ex rel Stokes vs. Probate Court, 22 O. S. 2d 120*)

10. Respondent admits that he hired as a Court employee, one, Rufus Smith and did place him in a